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THE COUNTY COURT SYSTEM.

THE County Courts Consolidation Bill, 1886, was a useful measure. It proposed to re-enact, faithfully and textually, though in systematic order, the eight ill-assorted statutes by which the County Court system is in the main now regulated. The object of a properly drafted Consolidation Bill, it has been said by a legal peer, is to rub the Legislature's nose in the anomalies of its own creation. If this process be effectually performed, there is some chance of getting the more glaring eccentricities of legislative activity cleared away from the statute-book. Forty years of haphazard law-making have produced a fine crop of inconsistencies and absurdities in the County Court system. Originally the County Courts were intended to be machines for the cheap and speedy collection of small debts. Their jurisdiction was limited to certain common law actions, where the debt or damages claimed did not exceed £20, and a procedure was devised for them adapted to their jurisdiction. But of late years there has been a growing tendency to decentralize the administration of civil justice, and the County Courts have been selected as the instruments for carrying this policy into effect. All kinds of jurisdictions and powers have been pitchforked on to the original structure. New wine has been plentifully poured into the old bottles with the familiar result. The functions of the County Courts are now regulated by ten exclusively County Court Acts, and by forty-two Acts, such for instance as the Employers' Liability Act[1], which incidentally give jurisdiction to and impose duties on these Courts. The resulting system is as complicated and illogical as could well be imagined. It is quite time that the matter was reconsidered and put on some intelligible footing. The whole subject was investigated by a strong Select

[1] Among matters in respect of which certain jurisdiction has been given to the County Courts may be mentioned, Friendly societies, charitable trusts, encroachments on commons, pollution of rivers, agricultural holdings, accidents in mines, habitual drunkards, and married women. It is now proposed to add lunatics generally to the list.

Committee of the House of Commons in 1878, who were unanimous in the great majority of their recommendations. Probably the best plan would be to introduce the Consolidation Bill again next year to show the Legislature what it has done, and at the same time to introduce an Amending Bill, based on the report of the Select Committee, to show the Legislature what it is suggested it ought to do. If both Bills were to pass second reading, they could be referred to a Select Committee with instructions to incorporate the amending with the consolidating measure.

The normal work done by the County Courts has increased very considerably during the last twenty years, as the following table shows:—

	Plaints entered.	Causes determined.	Amount sued for.	Amount recovered.	Fees received.
			£	£	£
For the year 1864 .	738,481	402,172	1,760,384	980,755	244,841
„ „ 1885 .	961,413	587,716	2,984,172	1,480,551	416,966
Increase . .	222,932	185,544	1,223,788	499,796	172,125

Of the plaints referred to, as entered in 1885, about 13,000 were brought to recover sums exceeding £20. In addition to this increase in the ordinary work of the County Courts since 1864, they have now an extensive equity jurisdiction, and the whole of the bankruptcy work of the country outside the metropolis has been shifted on to them.

For County Court purposes England and Wales are divided into five hundred districts. The districts are grouped together into fifty-nine circuits. As a rule a judge is appointed to each circuit, but the Liverpool circuit has two judges, and some of the London judges have each two circuits. Each district has its court, and a sitting of the court must be held every month, with this exception—the Lord Chancellor may order that no court shall be held in September, and in the case of small districts may order that the sittings of the court shall only be held bi-monthly. In the great towns of course the sittings are pretty nearly continuous. The circuits were mapped out before the railway system had been fully developed, and in many cases their arrangement is most inconvenient. To take my own case as an example. I have three districts, Birmingham, Atherstone, and Tamworth. To get to Atherstone or Tamworth takes two hours' travelling. I have to pass through the districts of two other judges, and through two towns where courts are actually held. On the other hand, Solihull, which is not in the Birmingham circuit, is only ten

minutes' rail from Birmingham, and there are three other courts on other circuits within half-an-hour's rail. Most of the other judges could, I imagine, furnish similar examples. A great saving of judicial time (that is, of public money), and also of the suitors' money, would be effected if some of the smaller courts were either abolished entirely or abolished as places of trial, and used only as district registries for the entry of plaints, etc. If this suggestion were carried out to any extent, either fresh duties might be imposed on the judges, or their numbers might be reduced. A judge very often has to travel for six or seven hours in order to do half-an-hour's work. In one court only eleven plaints were filed during the whole year, and in many of the small courts the salaries of the officers far exceed the total sums recovered by the plaintiffs. As a matter of money, it would be far cheaper if the Treasury paid all the plaintiffs' claims and gave each defendant a handsome present. Sir R. Harington stated in his evidence that, as a rule, he had to travel three hours for every hour he sat in court. I heard of a case the other day where the judge telegraphed to inquire what his work at a distant court would be. He was informed that there was one judgment summons for four shillings. Like a sensible man he paid the money himself, and thus got rid of a long and expensive day's travelling for nothing. It is always expensive to the parties to try a case of any importance at a small court, because advocates and witnesses have to be brought from a distance. Many examples of this inconvenience were brought before the Select Committee, and I think every unprejudiced person would be of opinion that the whole of the circuit arrangements require revision with reference to Bradshaw and the shifting of the population into the great towns. The amount of work done on the different circuits varies immensely. The Birmingham circuit heads the list with 39,773 plaints, involving claims to the extent of £122,188, 119 bankruptcies, and 338 administration orders[1]. The Liverpool circuit (two judges) comes next with 33,797 plaints, involving claims to the extent of £111,085, 161 bankruptcies, 74 administration orders, and 37 Admiralty cases. The Cornwall circuit comes last with 5,986 plaints, involving claims to the extent of £21,965, 23 bankruptcies, and 5 administration orders. There are six circuits on which the total number of plaints is under 10,000. The work done by the judges, though unequal, is not really so unequal as would at first sight appear. The judges with heavy courts have as a rule but little travelling. To some extent also the inequality in work is

[1] In the Birmingham Court last year rather more than 73,000 orders were made. I cannot get at the complete statistics of any other court.

right. A High Court judge is entitled to a pension after fifteen years' service, but no length of service gives a similar right to a County Court judge. He can only get a pension when he is incapacitated for work. As long as this rule is unaltered, it is only fair that there should be some light districts for aged judges.

The jurisdiction is limited (*a*) as to place, and (*b*) as to subject-matter and amount. The jurisdiction attaches to the court and not to the judge. The defendant must reside or some part of the cause of action must arise within the district of the court where the plaint is filed. The inflexibility of the rule sometimes operates harshly. For instance, in trying a case at Tamworth a short time ago I found that the cause of action arose about 100 yards over the boundary, in the Atherstone district. Although I was the judge of the Atherstone court and was going there the next day, I could do nothing but dismiss the action and the plaintiff had to begin over again in the right district. There ought I think in such cases to be some power of transfer, to be exercised of course upon terms.

As regards the subject-matter and pecuniary limits of jurisdiction the Legislature has indulged in the most eccentric freaks. The following list shows roughly the main heads of the existing jurisdiction of the courts.

Subject-matter.	Pecuniary Limit.
Common law action with written consent of both parties	Unlimited.
Action founded on contract (except actions for breach of promise)	£50.
Action founded on tort (except actions for malicious prosecution, libel, slander, and seduction)	£50.
Counter claim (unless the plaintiff gives written notice of objection)	Unlimited.
Employers' Liability Cases	Unlimited.
Replevin	Unlimited.
Equity jurisdiction	£500.
Probate jurisdiction	£200 personalty and £300 realty.
Bankruptcy jurisdiction	Unlimited.
Admiralty jurisdiction	£300.
Interpleaders transferred from High Court	£500.
High Court action on contract remitted to County Court	£50.
High Court action on tort remitted to County Court	Unlimited.

Under these provisions I have had myself to try on the same day a claim for eighteen-pence and a claim for two thousand

pounds. It is easy to multiply examples showing how capriciously jurisdiction has been conferred. The court can entertain an action for false imprisonment, but it cannot entertain the cognate action for malicious prosecution. It cannot try an ordinary action of contract (say on a bill of exchange) if the sum claimed exceeds £50, but if there be a claim for specific performance which involves the exercise of delicate and difficult powers, it has jurisdiction up to £500 and can award damages in the alternative. If the question arises on a disputed proof in bankruptcy the jurisdiction is unlimited. It cannot entertain an action for an injunction to restrain the infringement of a registered design; but if the action be brought for the penalty, it can in addition grant the injunction. If a question arise directly on a bill of sale the limit of jurisdiction is £50, but if, as more frequently happens, the question arises in an interpleader proceeding, the limit of jurisdiction is £500.

The sensible course would be to enact, as Lord Bramwell and several other witnesses suggested, that the plaintiff might bring any action for any amount in the County Court, but that the defendant might, as of right, remove it into the High Court, if the sum claimed or interest involved exceeded a specified amount. Different amounts might be specified in different classes of business. In appearance this would be a small change from the rule which gives unlimited jurisdiction with the written consent of both parties. But in reality the change would be considerable. The present law as to written consents is practically a dead letter. When the parties are stript for a fight, they will not shake hands over the tribunal. A defendant can now apply to have a case removed into the High Court whenever the amount claimed exceeds £5; but as a matter of fact he hardly ever does apply. There is a wide difference between asking a defendant to consent to jurisdiction and leaving him to object to it. Two objections have been urged against the proposed extension of jurisdiction. First, it is said the judges do not sufficiently command the public confidence to justify this increase of their powers. The answer is that this objection comes too late, having regard to their existing powers. It must be borne in mind that they could only exercise their increased jurisdiction when the plaintiff desired it and the defendant did not object. The proposed increase would not really put the County Court on the same footing as the High Court. It is the solicitor, and not the lay client, who chooses the tribunal in ninety-nine cases out of a hundred. As long as solicitors' costs are higher in the High Court than in the County Court, an action will not be brought in the County Court without some cogent reason for doing so. Moreover, as a general rule a heavy case is easier to try than

a small one. In a case of importance the evidence is sifted beforehand, and competent advocates are engaged. The judge has then nothing to do but to sit still, and give his decision when the time comes. He has no trouble, and comparatively little responsibility, because any party who is dissatisfied with the result can appeal as of right. In the small causes, which may yet be of great consequence to the parties, the judge has frequently all the work to do. The parties do not know how to present their cases. The judge has to cross-examine, find out the issues, and apply the law to them all for himself. Perhaps his misery reaches a climax when two women choose to go to law about some article of female attire. Each party insists on cross-examining the judge instead of her opponent, and diversifies the proceedings by making furious attacks on the moral character of the other lady[1]. The second objection to increase of jurisdiction is the confusion it might produce in ordinary County Court business. The sittings of the Courts have by statute to be fixed three months beforehand. Except in the case of large towns the judge appoints one day for each place on his circuit, going on the next day to some other place. Some judges have as many as fifteen towns on their monthly circuit. If then at any place to which only one day has been allocated a heavy cause is found it puts everything into confusion. Either the judge must sit to some unconscionably late hour to try it, or he must adjourn it part heard, and also all subsequent cases till he has finished his circuit and can return to the place in question. In any event all parties concerned are put to great inconvenience. The answer to this objection is that the evil exists already, and I do not know that the proposed increase of jurisdiction would do much to aggravate it. The remedy would be, as already pointed out, to give full jurisdiction only to courts situated at large and easily accessible towns. In small places the existing jurisdiction ought I think to be reduced to the old £20 limit. In a large court where the judge sits for several days continuously the business can be classified. For instance, at Birmingham there are a good many heavy cases. Until I classified the business I found I had sometimes to sit as long as nine or ten hours, and even then could not always finish my list. Now the plan adopted is this. Three hundred cases are put into each day's list, and non-jury cases and cases under £20 are heard on the return day. Jury cases and cases over £20, if defended, are put into a reserved list. One week in the month is

[1] Parties in person are very trying. I had the other day a case in which the plaintiff called the defendant's mother as a witness. The defendant wanted to cross-examine his own mother as to her unchastity in long by-gone days, and thought himself treated most unfairly because I would not allow this line of cross-examination.

given up entirely to the reserved list, and the cases are proceeded with *de die in diem*. There is a precedent for assigning heavy work exclusively to the large courts, inasmuch as such courts only have bankruptcy jurisdiction.

The constituent officers of a County Court are the judge, the registrar, and the high bailiff. The judges must be barristers of not less than seven years' standing. They are not allowed to practise or sit in Parliament. Originally their salary was fixed at £1200 a year. When equity jurisdiction was conferred on them in 1865 the salary was increased to £1500. Since that date some thirty acts have been passed giving fresh jurisdictions to the County Courts, and the whole bankruptcy work of the country outside London has been cast upon them, but the judges have received no increase of salary. The registrars, who are not overpaid, receive amongst them about £26,000 a year in respect of the bankruptcy business. The Select Committee recommended that the judges' salaries should be increased to £2000; but I suppose Parliament would reply that if the judges do not like the extra work they can resign, and there are plenty of more or less efficient men willing to do the work at the price. The judge has the power of appointing a deputy to act for him for one or more days, but he has in all cases to pay him himself. This of course is right if the deputy be appointed for any private reason, however urgent; but it is hard on the judge in case of accident or illness. A High Court judge has sometimes to obtain the assistance of a commissioner on circuit. I do not think he would like it, if he had to pay the commissioner himself. The County Courts, as such, have no criminal jurisdiction, but provision is made that a County Court judge may be made a justice of the peace for any county in his circuit without the usual property qualification. For many purposes it would be useful if he could exercise the powers of a stipendiary magistrate within his districts. A recent enactment further provides that a County Court judge may be included in any commission of assize. If this power were extensively used it would probably not give satisfaction. But at every assize there are always a certain number of trumpery cases, both civil and criminal, which it is mere waste of time and money for a High Court judge to try. Where a County Court judge is not already over-worked, he might very well be asked to attend the assizes and take such cases as the High Court judge thought proper to relegate to him. It would be an unmixed advantage to the County Court judge to try a certain number of cases with really good counsel before him, and to have the benefit of consulting the High Court judge about them.

The registrars now must be solicitors. Formerly the post was open to barristers also. They are paid salaries varying from £100 to £700, according to the number of plaints filed during the year. When the number of plaints exceeds 6000 the registrar gets his maximum salary. The registrar in addition to his salary gets fees for equity, bankruptcy, and some other classes of business. In large towns he usually holds also the office of District Registrar of the High Court. He must reside within his district, and is allowed to practise his profession. The rule which makes the salary of the registrar of a small court dependent on the number of plaints seems wrong in principle. One registrar told me that, by making the tallymen who sued in his court prove their cases strictly, he had diminished his income by nearly a fourth. It is not fair that the salary of a judicial officer should depend on the number of decisions he gives for the plaintiff. I venture to submit that the registrars should in all cases receive fixed salaries. In fixing the salaries regard should be had to the amount of business done in the court (say) for the previous ten years. Perhaps too the salaries might be made subject to periodical revision, but I doubt the policy of this.

The jurisdiction of the registrar is as anomalous as that of the judge. The usual practice is for him to begin his sitting half-an-hour or an hour before the judge. The list for the day is called over before him. If a case is defended, or if unliquidated damages are claimed in it, he has no power to deal with the matter, however trifling the amount may be. In undefended cases of debt or for liquidated damages the plaintiff proves his case before the registrar, who thereupon gives judgment. After the registrar has disposed of his undefended cases, he comes and sits with the judge and makes minutes of all orders made. In equity his powers resemble those of a chief clerk in the Chancery Division. In bankruptcy he has extensive powers. He hears petitions, makes receiving orders and adjudications, usually takes the public examinations, and can deal with contested proofs, etc. where the amount involved does not exceed £200. I think that the registrars should have power to dispose of all undefended cases, and that, as the Select Committee recommended, they should have power to deal with defended cases where the amount claimed does not exceed £2, unless one of the parties required the matter to be adjourned before the judge. This would greatly accelerate proceedings in the very small cases. The £2 limit is suggested by the fact that in cases for less than that sum no advocates' fees are allowed unless by special order of the judge. If a registrar is competent to exercise the bankruptcy jurisdiction which he now has, he is clearly fit to deal with

a common law case involving only a few shillings. When a case for a small amount is in the nature of a test case, it should of course as now be tried before the judge. To give an example of the present system, one of my registrars (who is also a High Court district registrar) said to me the other day, 'I am sorry to have had to send you in this morning three cases for less than half-a-crown. I am now going off to try an Order XIV case for £1500.' As district registrar, the registrar exercises nearly all the powers of a High Court judge in chambers; and amongst other things, remits High Court actions to the County Court, and orders his own or some other judge to try them. As a matter of fact, the mutual good understanding which subsists between judges and registrars obviates any awkwardness which might be supposed to arise from this inversion of functions.

The high bailiff in the County Court answers, as regards his duties, to the sheriff in the High Court. In addition, nearly all the process of the Court is served by the high bailiff instead of being served by the parties as in the High Court. This plan works very well. It is on the whole cheaper and prompter than the High Court method. High Court judgments can now be enforced by judgment summonses in the County Court, and when a High Court judgment is enforced by process against the person the remedy in the vast majority of cases is sought in the County Court. It is worth consideration whether all High Court judgments should not be enforced through the County Court officers, whether the remedy be against the person of the debtor or his goods. The position and duties of the sheriff are anomalous in the extreme. Among the curiosities of English procedure is the rule that, when judgment goes by default in a High Court action for unliquidated damages, the case is referred to an under-sheriff and a jury to assess the damages. In several cases lately damages exceeding £5000 have been thus awarded. Nice and difficult questions of law are continually arising as to the true measure of damages, and the juries require careful directions. I venture to suggest that it would be more reasonable to refer such questions to the County Court rather than to a fortuitous executive officer like the under-sheriff. When the sum claimed exceeds £500 the parties should probably have the right to have the matter determined before a High Court judge. In the large courts the offices of registrar and high bailiff are distinct, but in the small Courts the registrar is usually also the high bailiff. There is much to be said against this confusion of judicial and executive functions.

As regards procedure, the Consolidated Rules of 1886 have for the most part assimilated the practice of the County Courts to that

of the High Court. The two systems differ however in four cardinal points, namely, the mode of service of the initial summons, the number of the jury, the method of pleading, and the procedure to enforce liquidated demands.

In the High Court, unless the defendant's solicitor undertakes to accept service, the writ of summons must be served personally. In the County Court the summons may be served either personally or by handing it at the defendant's residence to any person above sixteen who promises to deliver it to him. The latter is the mode of service adopted in the immense majority of cases. It is no doubt cheaper than personal service, but there are serious objections to it. Hardly a day passes but some judgment debtor complains to me that the judgment summons is the first intimation he has had of the action [1]. Of course this is often a mere lie, but the complaint is made so frequently that it must in many cases be true. What happens usually is this. The wife incurs a debt without her husband's knowledge. When the summons is served at the house, she pockets it, and either lets judgment go by default or goes and confesses judgment, professing to come on her husband's behalf. The first the unfortunate man hears of the matter is when an execution is levied in his house, or when an application is made to commit him for non-payment of the judgment-debt. Except where leave for substituted service is given, I think the initial summons should, as in the High Court, be served personally on the defendant.

In the County Court, when the sum claimed exceeds £5 either party may demand a jury, whatever the nature of the claim may be. I am inclined to think that a jury should only be demanded as of right when the sum claimed exceeds £20, but that the Court should have power to order any case to be tried with a jury. The County Court jury consists of five jurymen only. The number is certainly too small. One obstinate or wrong-headed man is much more mischievous on a jury of five than on a jury of twelve. There is no magic of course in the number twelve, but Englishmen are used to it, and bow more readily to the verdict of twelve than to the verdict of five men. The objections to jury trials in small cases are the length of time they take, the great increase of expense they involve, and the necessity for the employment of advocates. A party in person has very little chance with a jury against a moderately skilful advocate, unless indeed that party happens to be a good-looking woman. When the parties can afford the expense of a jury trial, I think a jury is a far better tribunal than a judge for dealing with questions of fact. The more I see of juries, the higher is the respect that I have for their decisions. A judge is always embar-

[1] On the day that I write this I have had three such complaints.

rassed by the feeling that his decision is in some sense a precedent. Juries are haunted by no such spectre, and have only to deal with the particular case before them. It may be, as Lord Bramwell says, that 'they mitigate the rigour of the law by going wrong sometimes,' but they do substantial justice between the parties. They have a marvellous faculty for scenting out a fraud. Why a jury should be better than a judge in this respect I cannot say, but I am sure of the fact. I do not accept the cynical legal explanation that however novel a fraud may appear to the lawyers there is certain to be at least one man on the jury who has attempted or committed a similar fraud himself.

In the County Court there are no regular pleadings. Where the claim exceeds £2 the plaint must be accompanied by particulars. Notice must also be given of certain specified defences. The plaint and particulars are thus equivalent to a specially indorsed writ. In the great majority of cases where the issues are simple this procedure works economically and well; but in the larger cases, it results in inconvenience. The plaintiff does not know what the defendant is going to rely on, and often has to be prepared with unnecessary witnesses. The defendant also is encouraged to set up speculative defences, hoping to catch the plaintiff unprepared. It is only possible to draw a rough line, but I incline to the view that where the claim exceeds £20 there should be pleadings as in the High Court, or that, at any rate, a statement of defence should be required.

The useful procedure under Order XIV in the High Court requires no description. The corresponding procedure in the County Court is very rudimentary and imperfect. Where the plaintiff sues to recover a debt or liquidated demand, he may on filing an affidavit verifying his claim take out what is called a default summons. This summons must be served personally on the defendant. If the defendant does not within sixteen days after service give notice of intention to defend, the plaintiff may sign judgment. If the defendant gives notice of intention to defend, the case proceeds as an ordinary defended action. The great defect in this procedure is that the defendant by a mere unverified notice, giving no particulars, can delay the plaintiff for (frequently) some two or three months. When the cases come on for hearing I find that the three commonest defences are that the defendant has a wife and large family, that he is 'only a surety,' or that he 'never had a proper bill[1].' The majority of the cases are defended merely

[1] The other day the defence set up before me to an action for the price of groceries was that the goods were ordered by the defendant's wife and that the plaintiff had taken his wife and he presumed the debt followed the wife.

to gain time. The plaintiff should be entitled to judgment unless the defendant, within twelve days after service, files an affidavit disclosing some *primâ facie* ground of defence, and the registrar should then have power to deal with the matter as if it were an application under Order XIV. There should of course be an appeal to the judge. Objections have been urged against giving the registrars this power. In the case of small courts the objections may perhaps be entitled to some weight, though I doubt it, but they are ridiculous where the registrars have already bankruptcy jurisdiction or are district registrars of the High Court. It is absurd to say that the registrars at Birmingham, for instance, are fit to decide applications under Order XIV in the High Court but are not competent to exercise the same powers in a County Court matter. I suggest that at any rate in courts where the Registrar has bankruptcy jurisdiction, or is a High Court district registrar, the procedure under Order XIV should be applied to the County Court.

A most important and unpleasant jurisdiction exercised by the County Courts is the power of imprisonment for debt given by section 5 of the Debtors' Act, 1869, as amended by section 103 of the Bankruptcy Act, 1883. Though that statute purported to be an Act for 'the abolition of imprisonment for debt,' no less than 43,475 orders of committal were made under it last year. But this is much too wide a subject for incidental discussion. The same remark applies to the well-meaning provisions of section 122 of the Bankruptcy Act, which attempted to apply the benefits of the insolvency laws to very small debtors, but which have proved a complete and melancholy failure.

In ordinary cases no appeal lies from the decision of a County Court on questions of fact. Until the present year there were two modes of appealing on questions of law, namely by special case and by motion, the motion in the first instance being for a rule nisi. Under the new rules, all appeals must be brought by notice of motion as in the Supreme Court. The abolition of the rule nisi is a great protection to the judges, because the appellate court now has before it the judge's notes and the reasons for his decision. Under the old system extraordinary statements were frequently made as to what had passed in the court below. These statements were founded either on the imperfect recollection of persons who had been present at the trial, or on the imagination of persons who had not. For similar reasons it would be beneficial if the proceedings on a prohibition were assimilated to those on an appeal.

The expenses of the County Courts are defrayed out of the fees

levied on suitors. It was stated by the Chancellor of the Exchequer this year that the County Courts were the only part of our judicial system which paid its way. Excluding bankruptcy fees, the fees collected in 1885 came to about £415,000, that is to say they amounted to nearly 30 per cent. of the total sum recovered by suitors. As the County Courts are self-supporting, it follows that the large courts have to pay for the small courts as well as for themselves. The fees ultimately fall on the unsuccessful party, which in the great majority of cases is the defendant, and the mass of the defendants are the poorest of the poor. In other words, the numerous poor litigants of the great towns are cruelly taxed for the benefit of the scattered litigants of the country districts. The Birmingham Court, for instance, after allowing for all expenses, makes a profit on its business of about £5000 a year. There are 65 courts in which the total fees do not amount to £100 a year, yet I take it no court can be maintained at a cost of less than from £200 to £250 a year. If, as I have already suggested, some of the small courts were abolished and others converted into district registries, the fees all round might be considerably reduced, to the great relief of the poor litigants.

The administrative working of the County Courts is controlled by a department of the Treasury, presided over by an officer who is known as the Superintendent of County Courts. If the creaking machinery supplied by the Legislature works with any degree of efficiency, it is in no small measure due to the experience and ability of the gentleman who for many years past has held the office of Superintendent. In every difficulty he is the *deus ex machinâ* whose kindly aid is invoked to solve it. In matters great or small he is always ready with advice and help, without stopping to inquire whether or no *sit dignus vindice nodus*. Eight years have now passed since the Select Committee recommended the reform and revision of the County Court system, but at what near or distant date the Legislature will find time to take this work in hand is a matter which lies in the lap of the future.

M. D. Chalmers.

THE INTERNATIONAL COPYRIGHT UNION.

THE foundation of the International Union for the Protection of Industrial Property—Patents, Trade Marks, and Designs—which was completed some three years since, has speedily been followed by the inauguration of a further Union for the protection of products of the human brain, which is of an even more important character than its predecessor.

The signature on the 6th of September last by several of the most prominent European States of the Convention forming the basis of the International Union for the Protection of Literary and Artistic Property, marks a distinct era in the history of the International law of Copyright. Owing to the necessity which exists in certain States for the assent of the legislature to be obtained as a condition precedent to entering such an Union, the formal ratifications of the diplomatic instrument have not, it is true, been yet exchanged, but there seems small reason to doubt that within the stipulated period of one year all the first signatory Powers, and others beside, will have completed the necessary formalities, and that the Union will enter into operative existence towards the close of this year.

Ten States—comprising Great Britain, with all of her vast colonial possessions, France, Germany, Italy, Spain, Belgium, and Switzerland—have in the first instance signed the Convention, which will thus embrace at the outset the major part of those States of the world which have either supply or demand for the species of intellectual labour in question. Great Britain with her colonies numbers about 300 million souls, and the population of the other States named swells the total to 500 millions. The mere enumeration of such figures demonstrates the importance of the work achieved.

Before proceeding to examine the actual results which may be expected to flow from the Union, and the legal aspect of the matter, both international and domestic, it will be expedient to pass in review the previous history of International Copyright law so far as this country is concerned; and it may be well to premise that the observations contained in this article have special reference to the main branch of the question, viz. Literary Copyright, although with certain necessary qualifications they may be taken to apply equally to the Protection of Musical and Artistic Property.

From an English point of view International Copyright is divided by a sharp geographical line into the two continents of Europe and America, the difficulties which have attended diplomatic negotiations on the subject in the two hemispheres being so entirely distinct, that it will be best to devote a short space to each separately.

With South America we have at present no Copyright Conventions, nor have any South American States as yet signed the International Convention, although it is highly desirable that they should do so. The great English-speaking Republic of the North has, however, for the parent State an importance in regard to this question which probably exceeds that attaching to all the rest of the world put together.

At the risk of going over ground already familiar to many it may be useful to commence by recalling to mind the conditions under which the publishing trade is carried on in Great Britain and the United States respectively.

In Great Britain the compactness of the market and the density of population favours the system of circulating libraries, the consequence being that individual purchasers of books are few, and first editions, designed to supply a limited demand, are for the most part of an expensive character. The English market therefore is small as to the quantity of copies sold compared with the numbers of the population, and may be described as being conducted on the principle of small sales and large profits, especially in regard to works of fiction and subjects of only transient interest. The absolute cost, however, of production in this country is probably less than in any other.

Which of the two, viz. circulating libraries and expensive editions, is cause and which effect, it is difficult to say; but at all events it is not beyond the range of possibility that with an extended market British publishers might aim at extreme cheapness of price for first editions, and so induce the British public to become purchasers, instead of as at present only readers of books. A trial of this system might in the end result in larger remuneration both for authors and publishers, coupled with advantage to the community; and it is one of the principal objects of International Copyright negotiations and legislation to promote such a system. At the present moment the purchase of new books is to the general English public an unattainable luxury.

The book-market of the United States differs entirely from that of Great Britain, the extended area and sparse population rendering circulating libraries on any large scale out of the question. The system therefore is one of individual purchases of cheap editions,

and under present circumstances these cheap editions are for the most part pirated reprints of the works of British authors.

Existing United States legislation does not render it possible for the work of an alien author to acquire protection in that country save under the condition of the author's permanent residence there, the result being that any American edition of the work of a British author is speedily undersold by one at a less price. Up to a comparatively recent period it appears that a 'custom of the trade' prevailed, which, on the principle of honour among thieves, prevented the alien work first reprinted and published by any one American firm being reprinted in the United States in order to undersell that firm. The fact that this 'custom of the trade' has now disappeared explains how it is that the publishing interest in the United States is at present not averse to legislation for the protection of alien authors.

It will be obvious, however, that one of the main obstacles which have hitherto prevented a satisfactory international arrangement, is the difficulty of obtaining assent in Congress to any legislation which might have the effect of increasing the price of English books to the reading public. As an instance of the price at which British works are produced in the United States, it may be mentioned that Justin M^c^Carthy's 'History of our own Times,' first published in England at about £2 12*s.* 6*d.*, was issued in an excellently readable American reprint for 1*s.* 8*d.*

It is difficult to suppose that the American public would lightly give up the privilege of getting such cheap literature; but other and higher considerations are now beginning to come to the front. It is felt that piracy operates to the detriment of American authors as a discrimination in favour of foreign cheap reprints—cheap because not paid for; and it is obvious that small margin can be given for the remuneration of native authors, when an ample supply of foreign literature is available without any royalty to the author. American authors naturally complain of the existing state of things, and even the publishers feel that international copyright would secure them from being undersold in respect of an edition honourably acquired by payment to the English author. It is evident too that whereas there may now be perhaps six new publications of one English work in the United States, involving in each case the expense of first cost of printing and rival advertisement—always by far the most serious items—there would, in the case of copyright being in the hands of only one firm, be only one such expenditure, which in either case would, large or small, be eventually borne by the public.

There are thus many reasons to render the American public

dissatisfied with the existing state of affairs. Not only are there good grounds for supposing that the effect of a satisfactory copyright arrangement with Great Britain would not in the long run tend materially to increase in the United States the cost of editions, which would naturally be produced at a price to suit the peculiar circumstances of the market; but the extensive use made of pirated English works entirely stunts and cripples the growth of a national literature, which under more favourable conditions might be second to that of no country in the world.

The Revised Statutes of the United States, in twenty-three admirably clear and concise sections, grant copyright to 'any citizen of the United States or resident therein' for any species of work susceptible of being copyrighted, on the following conditions. Copyright endures for the space of twenty-eight years from the time of recording the title, which must be done before publication. A further term of fourteen years is granted to the author, or his widow or children, on recording the title a second time. Copyright includes the sole right to print, to dramatise, or to translate. Copies of literary and musical works, and photographs of works of art, must be deposited in the Congressional Library within a given time. Copyrights are assignable at law. But section 4971, the last of the chapter on Copyright, enacts—

"Nothing in this chapter shall be construed to prohibit the "printing, publishing, importation, or sale of any book, map, chart, "dramatic or musical composition, print, cut, engraving, or photo-"graph, written, composed, or made by any person not a citizen of "the United States nor resident therein."

Under these conditions it is not surprising that the record of diplomatic negotiations for an International Copyright Convention between the two countries is one of monotonous failure. Great Britain has little direct inducement to offer, since under existing English law first publication by an American author in the United Kingdom, or simultaneous publication therein and in the United States, gives title to copyright throughout the British Empire.

Such negotiations have taken place from time to time. A Draft Convention was proposed to the United States some twenty years ago, but not being found acceptable the negotiations came to an end in 1870, and from that date the question appears to have slept until 1879, when an amended version of the British Draft, put forward by Messrs. Harper, was under the consideration of the two Governments. It being, however, then expected that copyright legislation in this country was impending, in view of the Report of the Royal Commission which had been appointed to consider the subject, it was deemed advisable to postpone the negotiations.

More recently, in 1881–2, communications have passed between the two Governments on the initiative of Mr. J. R. Lowell, then United States Minister in England, and one or two Draft Conventions have been under consideration, but so far the United States Government do not appear to have felt themselves able to proceed towards any definite result.

In all these negotiations, the United States Government have treated the question from a practically protective point of view, and have insisted, as the basis of any Convention, on the condition that the works of aliens, in order to acquire protection, must be reprinted in America.

This condition opens the door to a wide series of difficulties, such for instance as the delay within which an English work must be reprinted in the United States in order to obtain copyright therein. Various periods ranging from three months to a year have been suggested, and, granting that in any practical scheme some such delay must be given, how is the American market to be supplied during the period within which copyright may be claimed by British authors? In the case of works by recognised authors no difficulty would probably occur, since publication would be practically simultaneous in both countries; but in the case of works of less known writers, the United States public might apparently be excluded from reading them altogether for the period of delay, if the copyright should not be taken out in America, by reprinting, until the last moment: for until the stipulated delay had expired, no one would dare to reprint without the consent of the author.

It would also be very necessary to consider whether the use of stereotypes prepared in this country would be allowed in reprinting. As many of our readers, although familiar with the intricacies of copyright law, may not be acquainted with the practical process by which books contemplated for any extended circulation are now manufactured, it may not be amiss to explain that when the type has been set up by hand, several moulds are taken of it, the material used being generally paper. These moulds are treated with some preparation of asbestos to render them incombustible, and the leaden cast taken therefrom forms the stereotype, which is passed through a steel electrotype bath to harden the edges and so preserve a clear print after many impressions.

Although opposed in principle to the condition of reprinting, the British Government have been willing to agree to it rather than forego the benefits of an International arrangement, but even so no real progress has been made, and so far as diplomatic

negotiations go, the question has not practically advanced towards solution for the last quarter of a century.

Lately, however, the United States Government have been showing a spontaneous interest in the matter. Their Minister at Berne was appointed to attend the International Conferences, and declared the sympathy of his Government for the substance and aims of the International Convention, to which he stated that they were well disposed to accede, providing the necessary legislation could be passed in the United States: and it is not too much to say that the attitude of Mr. Boyd Winchester, the American Delegate to the International Conferences at Berne, gives real promise that this disposition will ere long lead to practical and satisfactory results.

Several Bills have recently been introduced in the United States by Mr. Dorsheimer, Mr. Chace, Mr. Hawley and others, with the object of repealing section 4971 of the Revised Statutes, and of making general provision for securing copyright to aliens; but all these, with the exception of Mr. Hawley's Bill, retain the objectionable feature of compulsory manufacture in the United States; and even Mr. Hawley's Bill, as well as the others, would not completely meet the provisions of the Berne Convention, inasmuch as they leave unrepealed the principle of deposit and registration of foreign works in the Congressional Library, whilst the International Convention declares that copyright shall be secured by the mere fact of fulfilling the conditions, whatever they may be, required by law to establish title to copyright in the country of origin of the work.

Even supposing, however, that the United States do not find themselves in a position to adhere shortly to the Bernese Convention, it is possible that the recent International Copyright Act, 49 & 50 Vic. c. 33, may facilitate negotiations for a separate Convention between Great Britain and the United States, some of the technical difficulties being thereby removed, and additional inducements being held out.

Some proposals have recently been put forward unofficially for an international arrangement on the basis of a royalty to the author by means of a Government stamp, but so far there does not appear to be any very great chance of such a scheme assuming practical shape. Not only would it involve endless administrative difficulties of detail, but, being opposed alike to the principles of English and of all continental Copyright laws, it would require a sweeping change of legislation, from which the boldest innovator might well recoil.

The Copyright question with the United States therefore arises

entirely from the fact, that in America the right of aliens to protection in respect of their intellectual property is not recognised at all; the legal remedies against piracy, freely granted to natives, being denied to foreigners. As between two English-speaking peoples, the question of the exclusive right of translation does not assume any prominence.

Turning now, however, to the continent of Europe, we find that the difficulties which have hitherto beset the negotiator do not proceed from any disinclination on the part of foreign States to accord ample protection to alien authors under certain conditions, but from the practical difficulty of determining what those conditions shall be, under the varying aspects of the domestic laws in operation in different States.

The main stumbling-blocks in recent negotiations between Great Britain and foreign States may be stated as follows:—

1st. The question of the exclusive right of translation.

2nd. The question of registration and deposit.

3rd. The practical difficulty of understanding and reconciling two, perhaps widely divergent, systems of Copyright law.

In regard to the first question it will be sufficient to quote from the Report presented on the 25th of September, 1885, to the Marquis of Salisbury by the British Delegates to the International Conference at Berne [1]:—

'The most important point in the question of international copyright is to determine for what period the exclusive right of translating an original work shall be secured to the author.

'Three systems alone seem feasible:—

'(*a*) The complete assimilation of the exclusive right of translation to that of reproducing the original work; that is to say, the author shall be able to prevent the unauthorized translation of his work for the whole period during which his copyright in it subsists.

'In favour of this system it is urged that in international transactions translation is in most cases practically the only form of reproduction; and that it therefore seems absurd to grant a certain specified period of protection abroad to the original work, if, in regard to the only available means of reproduction, viz. translation, the protection is limited to a much shorter period.

'On the other hand, it is contended that such a complete reservation to the author of the right of translation is injurious to the public, as tending to deprive them of the benefit of translations which might be made, if the translating right were allowed sooner to fall into the public domain.

'(*b*) To limit the right of preventing the unauthorized translation to a certain number of years from the date of publication of the

[1] See Parliamentary Paper, Switzerland, No. 1, 1886, C. 4606.

original work, on condition that an authorized translation shall appear within a certain fixed period.

'On this system the existing British law gives the exclusive right of translation to the author of a foreign work for a period of five years from the publication of an authorized translation: but on condition that a part of such authorized translation must have appeared within one year from the date of registration in the United Kingdom, and the whole of it within three years from that date. The exclusive period thus extends in some cases to eight years from the date of publication.

'(*c*) To limit the exclusive right of translation to a fixed number of years, absolutely, without the condition that an authorized translation must appear within any fixed period after the publication of the original work.

'This system has certainly the merit of simplicity, and it may be claimed in its favour that the desire of the author to enjoy the longest period of protection will furnish him with sufficient inducement to publish a translation speedily, and thus to supply the public demand within a reasonable time.'

With reference to the second point, viz. deposit and registration, continental nations are now practically unanimous in considering that the antiquated formality of double registration (viz. in the country of origin, and in the foreign State), which till recently was imposed by British law, is idle and unmeaning. It is clear that such a condition imposes an onerous burden on authors who may seek to obtain protection in several States, especially in the case of costly works, the expense of presenting copies of which to foreign governments, and the need of paying an agent to effect the deposit and registration, must often debar a needy author from obtaining the copyright at all. A tenacious adherence to this principle on the part of Great Britain has, however, hitherto been one of the main contributory causes to the failure of all recent negotiations for new or amended Copyright Conventions with foreign States.

The Royal Commission, which in 1878 made such an exhaustive enquiry into the Copyright question, recommended the abolition of the obligation to register and deposit foreign works in England, and it was pointed out that the deposit of foreign works in the British Museum was deemed to be valueless by the Principal Librarian. England, however, remained the only European State still clinging to the old practice, and it was not removed till the passing of the recent International and Colonial Copyright Act, 49 & 50 Vic. c. 33, an examination of the provisions of which will form the conclusion of the present article.

As respects the third point, viz. the difficulty of understanding and reconciling two different systems of copyright law, Great

Britain has certainly been the principal delinquent. Some continental systems, it is true, do not afford entirely adequate protection to all forms of intellectual property, but in the large majority of States greater liberality is displayed towards authors than is the case in Great Britain; while the laws themselves, which give effect to the protection, are *ABC* as compared with the complicated English statutes.

The British Royal Commission of 1878 reported that the form of the existing British Copyright Law is bad, that it is "wholly desti-"tute of any sort of arrangement incomplete often obscure, and even "where it is intelligible upon long study, it is in many parts so ill-"expressed that no one who does not give such study can expect to "understand it." It can scarcely be matter for surprise that when, in recent times, conventions based upon such a domestic law have been proposed to foreign States, they have either shelved the question as unintelligible, or abandoned the negotiations in disgust.

Having alluded to the main difficulties hitherto obstructing Copyright negotiations, it will be desirable, before proceeding to the examination of the Act by which it is to be hoped that they have been removed, to trace very briefly the history of the various British International Copyright Acts which have preceded that of 1886, and of the Conventions with foreign States which have been concluded under them.

As by degrees the Common Law affecting Copyright in England became crystallized by statute, the need began to be felt for international arrangements: not only for the protection of the rights of aliens in this country, but for securing those of British subjects abroad.

The first International Copyright Act (1 & 2 Vic. c. 59) was accordingly passed in 1838, but did not by any means fulfil the objects for which it had been undertaken. It was found in the course of negotiations which then took place, that continental States urged, with much insistence, that the rights granted to their subjects in England should be equivalent to those which they were prepared to grant on their part to British subjects. The then new British International Act covered only the domain of Literary Copyright, leaving untouched the almost equally important branches of music, the drama, and the fine arts; and when, four years later, in 1842, the great domestic Copyright Act, 5 & 6 Vic. c. 45, was passed, it was felt that the provisions of the preceding International Act, insufficient as they had been before, had become totally inadequate to enable Her Majesty to extend to citizens of foreign countries the rights secured in England to natives by the recent domestic Act. No Conventions with foreign States had been successfully negotiated

under the International Act of 1838, and the consequence was that an Act to amend the law relating to International Copyright (7 & 8 Vic. c. 12) was passed in 1844.

This still remains one of the International Copyright Acts at present in force, and under it the existing Conventions with Prussia of 13th May, 1846, and with several other German States, were concluded. These were practically on the basis of securing to owners of Copyright property, being citizens of the one State, the same protection as that granted by law to natives in the other; and it is a curious fact that neither in those Conventions, nor in the International Copyright Act, 7 & 8 Vic. c. 12, under which they were concluded, is any mention or provision made respecting translations.

International copyright was therefore still in an embryonic stage, and when a few years later negotiations which had been for some time in progress with France resulted in the signature of the Convention of the 3rd November, 1851 (that now in force), it was found necessary to carry its provisions into effect by an additional Act, containing minute provisions on the subject of translations. This is the now existing Act, 15 & 16 Vic. c. 12, passed in 1852.

Prussia and other German States did not wait long to avail themselves of the additional advantages secured by the new Act, and speedily concluded with this country the Convention of 14th June, 1855, and other subsidiary arrangements which place them practically on the same footing as France in their copyright relations with Great Britain. Belgium, Spain, and Sardinia[1] also concluded similar Conventions with Great Britain on the 12th August, 1854, 7th July, 1857, and the 30th November, 1860.

After this a certain period of inaction set in, broken only by the passing in 1875 of a short additional International Act, to remedy a defect caused by the Convention with France, relative to imitations and adaptations of dramatic pieces and musical compositions; and by the denunciation of the Convention with Spain, followed by the conclusion of a new but provisional Convention on the basis of the existing British Acts, but not without protest as to their insufficiency.

Of late years there has, however, existed a growing dissatisfaction amongst foreign States in regard to their Copyright Conventions with Great Britain, and all attempts (save that with Spain) to conclude new arrangements have invariably failed, principally owing to the imperative and now obsolete conditions as to transla-

[1] This Convention was afterwards adopted by the newly founded kingdom of Italy.

tions, registration, and deposit contained in the International Acts, 7 & 8 Vic. c. 12 and 15 & 16 Vic. c. 12[1].

This state of things became so thoroughly unsatisfactory that in 1883 the International Literary Association made earnest efforts to improve it, and at a meeting held at Berne produced a scheme for the formation of an International Copyright Union, which showed such promise that the Swiss Government took the matter up and invited all the Powers to an International Diplomatic Copyright Conference to consider—and, if possible, frame—the bases of such an Union.

The first meeting of the Diplomatic Conference took place in 1884, and resulted in a Draft Convention, which on being submitted to the appreciation of the various Powers was found inacceptable in many particulars, especially to Great Britain, who had only been represented by a Delegate in a consultative capacity, with no power to vote, to discuss, or even to share in the drafting of the Convention. At the second Diplomatic Conference held at Berne in 1885, Great Britain was however represented by Delegates armed with ampler powers, and the result was the framing of a Draft which was identical with the Convention signed last September, and with the general provisions of which our readers will be familiar from an article in our number for last April.

The broad principles of agreement are that each State of the Union shall accord to the other States composing it the advantages of national treatment, on condition simply of the accomplishment of the formalities prescribed in the country of origin in order to secure a Copyright there; thus abolishing the antiquated forms of double registration and deposit. The protection, however, is not to exceed that granted in the country of origin (i. e. first publication). The exclusive right of translation is reserved to the author for at least ten years after publication; and provision is made for the due protection of musical, artistic, and dramatic copyright.

This Draft on being submitted to Her Majesty's Government was considered to be acceptable, and early in 1886 a Departmental Committee was formed under the able Presidency of Mr. Bryce, M.P. (then Under-Secretary of State for Foreign Affairs) at which not only representatives of the Foreign, Colonial and India Departments, the Board of Trade, and the Government Draftsman were present, but which was also attended by the Agents of the principal self-governing Colonies.

In view of the exigencies of that Session, and of the necessity

[1] A small subsidiary Convention has however recently been concluded with Germany for the purpose of applying the provisions of the Conventions of 1846 and 1855 with Prussia to such German States as had not already adhered thereto.

to place Great Britain in a position to sign the International Convention within a few months, it was found imperative to abandon a recommendation of the British Delegates to the recent Conference, to the effect that the opportunity should be taken to make a complete codification and amendment of British Copyright Law as suggested by the Royal Commission of 1878.

Although the Government of the day were well disposed to undertake such a measure, it was recognised that it involved many disputable points, would occasion much discussion in both Houses of Parliament, and would certainly occupy a large share of the Government time. It was therefore finally decided to prepare a Bill for the purpose of amending the existing Statutes in conformity with the provisions of the Bernese Draft.

The Committee had before them a task of no ordinary difficulty. The work of reconciling the multifarious provisions of the existing complicated and confusing Statutes with the exact principles of the International scheme, involved knotty questions of every kind,—'from grave to gay, from lively to severe;' from the most serious questions of the rights of property to the consideration whether under the terms of the proposed Convention it would be needful to expressly permit by law the reproduction of operatic airs by street organs, or whether the organ-grinder, as *hostis humani generis*, might, under a well-recognised rule of International law, be treated as a *Pirate*, and punished accordingly.

The result, however, was the passing of the International and Colonial Copyright Act, 49 & 50 Vic. c. 33, the effect of which is as follows; taking section by section for the benefit of legal readers, who may perhaps be disposed to collate the text of the Act with the observations herein made.

The Preamble states the expediency of enabling Her Majesty to accede to the proposed International Convention.

Section 1 contains the short title and other formal provisions.

Section 2. (1) enables a single Order in Council to be made applying to several foreign States.

(2) Is designed to meet the stipulations of Article III of the International Convention, to the effect that if a work is published in a State of the Union by an author who belongs to a non-contracting State, the legal remedies against piracy must be taken by the publisher instead of by the author himself.

The object which the Bernese Conference had in view in making this stipulation was, that it would be undesirable to grant too extended facilities to authors of non-contracting States, lest they might obtain all the benefits of the Convention by publishing in a State of the Union. The effect is now somewhat to limit any

benefits to be obtained by such publication in these cases; inasmuch as the author has no individual legal remedy, although he can secure one—by agreement—through a publisher. It was thought by the majority of the Conference that this stipulation would act as an inducement to foreign States to join the Union.

(3) Provides, in accordance with Article II of the Convention, that the protection in any State of the Union is not to exceed that granted in the country in which the work was *first produced*, which for the Union is regarded as the *country of origin*.

The practical effect of this will be shown by a further quotation from the Report of the British Delegates.

'To give an example: the duration of copyright in Spain is for the life of the author and eighty years after his death; in France, life and fifty years; in Belgium, life and twenty years.

'If protection under the Convention were claimed for a work of French origin in Spain, the duration would be for the life of the author and fifty years after his death, the maximum period granted in France; but if the protection were claimed in Spain for a work of Belgian origin, the duration would be for the life of the author and twenty years, the maximum allowed by Belgian law.

'If, however, protection were claimed in Belgium for works of Spanish or French origin, the duration would in each case be for life and twenty years, according to Belgian law.'

Section 3. (1) When the question of the mode of determining the *country of origin* was under discussion at the Bernese Conference, it was found necessary to meet the case of simultaneous publication in two or more countries; and it was accordingly stipulated in Article II, that in such cases the country of origin should be that in which the least period of Copyright protection was granted by law.

This subsection meets the case by enabling Her Majesty to determine, in the Order in Council applying the Act, the country of origin in such cases.

The Order in Council to be issued for the purpose of putting the International Convention in force, will therefore contain a provision in accordance with the principle adopted in the Convention.

(2) Is to meet the special case of simultaneous publication in *England* and in another State of the Union.

Under existing British law first publication in the United Kingdom, by an alien or a native, entitles to the term of Copyright accorded by the English Statutes, whether such publication has been effected, or not, simultaneously with publication in a foreign State. But under the International Convention, supposing the foreign State to be one where a less period of protection were granted than in England, the foreign State would be the country of origin of the work, and the period of protection would be

determined by the laws of such foreign State, not by those of Great Britain. This principle will now be applied to the United Kingdom in any Order in Council issued to give effect to the International Convention.

Section 4. (1) Remits, in the case of any foreign State to which the Act is applied by Order in Council (i.e. any State of the Union), the necessity hitherto imposed by the International Copyright Act to register and deliver copies in England of any work produced in such foreign State.

(2) Is designed to remove a difficulty hitherto felt in International negotiations in consequence of the terms of section 14 of the Act 7 & 8 Vic. c. 12, which provides that the ground for issuing an Order in Council applying the Act must be stated to be 'that *due protection* has been secured by the foreign Power so named in such Order in Council for the benefit of parties interested in works first published in the dominions of Her Majesty *similar* to those comprised in such Order.' These words—although not free from ambiguity—have hitherto been held to imply that an exact reciprocity must be secured in the foreign State, as a condition precedent to applying the Act.

It has now been deemed advisable to repeal the above quoted section, and to give to Her Majesty the wider powers conferred by section 4. (2) of the present Act, viz. to apply the Act where such provision (if any) has been made in the foreign State, as it appears to Her Majesty *expedient to require*. This will enable this country, in case of necessity, to conclude Copyright Conventions with foreign States, even if such States should not be in a position to grant an exact reciprocity.

The advantage of this seems obvious. Not only does it remove an impediment to successful negotiation, but there can be no doubt that cases might easily arise where it would be desirable to secure to British subjects the benefits accorded to natives in a given foreign State, even though the protection might not embrace all forms of intellectual property, or might not otherwise be so ample or effectual as that secured to natives in England.

Section 5. Bearing in mind the principle adopted by the International Convention, that the exclusive right of translation should be reserved to the author for a period of not less than ten years from the date of first publication, the Departmental Committee had naturally to consider in all its bearings the question of the exclusive right of translation.

It was recognised that the translation of a book stands to it in much the same relation as an engraving does to a picture. It was further considered that, as in regard to International dealings with

continental States translation was the principal form of reproduction, it was idle to secure copyright to the *original work* for an extended term, whilst the protection accorded to it in *translation* should be allowed to expire at an earlier date. At the same time it was felt that some provision should be made to secure to the British public the possible benefit of at least some translation of any work within a reasonable time.

The hitherto existing restrictions in regard to translations, viz. that a portion of a translation must appear within one year after the registration of the original work and the whole within three years, in order to secure an exclusive right of translation for the maximum period of five years, were believed to act prejudicially alike to the interest of author and public. The author could not afford to make expensive arrangements for translation, and the public got as a rule a hasty and ill-executed version of the original. It was therefore considered that extended rights would enable the author to make more satisfactory, because more remunerative, arrangements, and so to supply the public with a better article at probably a less price. The effect being anticipated that a large business in translations, hitherto dormant, would speedily spring up under more congenial legislation.

The existing law of several continental States already recognises the principle adopted in the new British Act, which under the International Convention will enable British authors to enjoy in such States equivalent benefits to those now accorded to foreigners at home in respect to the translating right.

Section 5. (1) therefore in substance gives to the foreign author the exclusive right of translation for the whole period of the copyright enjoyed by him in the United Kingdom for the original work; whilst subsection

(2) Provides that if within ten years (or any other term named in the Order in Council) an authorized English translation of the work shall not have appeared, the exclusive right shall cease, and the book may then be translated by any one.

In the case of an Order in Council applying the International Convention the term in this subsection would therefore be placed at ten years, in compliance with Art. V of the Convention; but in the case of possible negotiations with any States outside of the Union the period might be curtailed or extended according to the advantages to be offered on the other side.

(3) Applies specifically by statute a principle already flowing from existing law and treaty—namely, that a lawfully produced translation is entitled to the same protection as an original work. This relates to any particular translation regarded as

a separate work, and does not refer to the exclusive right to translate.

(4) Contains a saving for unrepealed provisions of the International Copyright Act of 1852 (viz. 15 & 16 Vic. c. 12).

Section 6 provides for the retroactive effect of the International Convention; that is to say, any work published before it comes into operation may, if the prescribed term of copyright has not expired, become entitled to the protection accorded by the Convention; but with a saving for existing rights, designed to meet the case, for example, where a music publisher should have already embarked capital in the production in England of a German work which had not acquired protection under the existing Conventions, but which would do so under the International Convention.

Section 7. The previous sections of the Act having abolished the conditions of registration of a foreign work in the United Kingdom, it was obviously necessary to provide a means whereby the existence of a title to copyright in a foreign country should be proved before English Courts. This section therefore enacts, in accordance with the suggestion of the Royal Commission of 1878, and with the provision of Art. XI of the International Convention, that an extract of a foreign register, or other properly authenticated document, shall be taken by the English Courts to be evidence of the existence of copyright in such foreign State.

Sections 8 and 9. It will not have escaped attention that the provisions of the previous sections are applicable only to the United Kingdom: but it was the intention of the framers of the Bill to comprehend, if possible, all the Colonial Possessions of Her Majesty.

It has been a long-standing grievance in the Colonies that the previously existing Imperial Acts give to authors of books first produced in the United Kingdom copyright throughout the Empire, but do not give it to the authors of books first produced in a British Colony. The International Copyright Acts, as applied by Order in Council, extend to certain foreign States similar privileges to those conferred by first publication in the United Kingdom.

Hitherto therefore a book first published in a British Colony stood in a worse position than one published either in the United Kingdom or in a country with which Great Britain has a Copyright Treaty: for it had no Copyright outside the Colony wherein it was published. This grievance has now been removed, with the full consent of India and all the self-governing Colonies, the governments of which have unanimously expressed their concurrence in the new Act and their desire to join the International Copyright Union.

Section 8. (1) therefore provides that the British Copyright Acts shall extend to a work first published in a British Possession; with the provisoes that registration established by law in a Colony shall suffice in place of registration in the United Kingdom, and that the provisions of the Imperial Acts as to delivery of copies (i. e. at the British Museum, &c.) shall not apply.

(2) Enacts that entries in a legally established Colonial Register, or properly authenticated copies thereof, shall be evidence of the title to copyright.

(3) Empowers Her Majesty by Order in Council so to modify the present Act as to save and confirm any pre-existing Colonial legislation in such manner as may seem expedient.

This is designed to meet the case of Acts already in operation in Canada and other Colonies, which have made laws relating to Copyright within their own jurisdiction.

(4) Preserves to each Colony its present power of legislating on Copyright as regards works produced within the limits of the Colony, but does not affect the Copyright in that Colony of works first produced in the United Kingdom or in other British Colonies.

Practically therefore the effect of this section is to grant Copyright throughout the British Empire, on the terms of the existing Imperial Acts, to the works of authors first produced in any part of Her Majesty's dominions; and, when the International Convention comes into effect, throughout the Copyright Union, on the terms established by the Convention.

Section 9 applies the Act to every British Possession, but reserves power to Her Majesty by Order in Council to except any British Colony from the operation of the Act; but, as all the Colonies have consented to be included, it may be anticipated that it will not be necessary to put the last-named reservation into effect.

Sections 10, 11, and 12 are of a formal character, providing for the making and revoking of Orders in Council; saving for existing rights; interpretation; and repeal of Acts specified in the third schedule.

In substance therefore the new Act establishes an uniform system of Copyright throughout the British Empire, enables Her Majesty to accede to the recently-signed International Convention, and removes the principal difficulties hitherto existing in regard to the conclusion of satisfactory arrangements with foreign countries. This is no mean achievement; and though the Bill passed through both Houses of Parliament comparatively unobserved, it may be predicted that, if found to work well in practical detail, it will hereafter take rank as one of the most important domestic Acts of

recent years, and prove a further bond of union throughout the British Empire.

At the present moment we have International Copyright Conventions in force only with Germany, France, Belgium, Italy, and Spain. The conditions of these Conventions are insufficient and obsolete, unsatisfactory alike to the author and to the public. The International Convention, which is destined to replace them, has already been signed by ten States; it is to be ratified by the 9th Sept. 1887, and will come into operation three months later. When this has taken place it may fairly be asserted that, subject to the test of practical application, the new Convention will have solved the question of International Copyright for some time to come so far as the contracting States are concerned. In view however of the possibility of unforeseen difficulties arising on points connected with the Convention, provision has been made for periodical Conferences for revision, the first of which is to take place at Paris between the dates of 1891 and 1893, according to circumstances.

There still however remains for the consideration of Her Majesty's Government the question of the consolidation and amendment of the Domestic, as distinct from the International, Copyright laws. The need for this matter to be seriously taken up has been too often urged to make any repetition here necessary. The new Act, even if, as appears probable, completely satisfactory in effect as regards the International and Colonial branches of the question, adds yet another statute to the already cumbrous British law; and, from the very nature of the matters to be dealt with, is to a certain extent difficult to grasp thoroughly. Not only are the present British Statutes, as a whole, incomplete and unsatisfactory for English requirements, but to the foreigner they are a sealed book, alike incomprehensible and unmeaning. The Government which first succeeds in the task of cleansing the Augean stable by a clear and succinct codification and amendment will have earned a lasting title to the gratitude of the Literary, Scientific ,and Artistic world.

J. H. G. Bergne.

[Since this article was in type the President of the United States has in his annual message commended the subject of International Copyright to the attention of Congress.]

POSSESSION IN THE ROMAN LAW.

THE theory of possession in English law is receiving a degree of attention which has hitherto been conspicuously wanting. The chapter by Mr. Justice Holmes in his Common Law is admirable for its clear and comprehensive treatment, and the recent articles by Mr. Maitland [1], who talks with easy indifference of the seisin of chattels and dares to doubt the existence of the proud freeman who would not stoop to a term of years, are as interesting as they are heterodox. We are promised, moreover, a fuller handling of the subject by the Editor of this REVIEW and Mr. R. S. Wright. Perhaps then it may not be inappropriate to call attention to certain views on the same subject in Roman law of which hitherto little notice has been taken. It is true indeed that the differences in this respect between the two systems are very striking, and Mr. Justice Holmes, who treats the civilians with scant respect, prefers to look for guidance to a 'far more developed, more rational, and mightier body of law than the Roman [2];' but the knowledge he shows of their writings proves that he has himself by no means neglected them, and we shall not be far wrong in following his practice rather than his precept.

Our ideas on the subject hitherto have been taken chiefly from Savigny. After the theory of possession had been for centuries the battle-ground of rival schools, he removed the obscurity in which it had become involved, and left behind him a clear and symmetrical, if not altogether consistent system. For many years this held almost universal sway, and was generally adopted into the text-books on Roman law. But critics have not been wanting. Of these the most conspicuous in recent times has been Prof. Von Ihering of Vienna, and it is the new and striking theory which he has put forward that I wish to exhibit and to some extent examine. Its absolute truth I freely admit to be doubtful; but it seems to me to throw a strong light upon the decisions of the jurists.

It has for its central idea the intimate connection between possession and ownership. Of the existence of this no student of Roman law can be in doubt, but Ihering makes use of it to sever the old bond between possession and *corpus*, or physical control, and to define the former anew as being the actual external form of ownership, which may or may not involve the latter as an element.

[1] Law Quarterly Review, July, 1885, Oct. 1886.

[2] Common Law, p. 210.

His contention is that the current theory starts at the wrong end [1]. Beginning with actual detention, by oneself or another, it passes from this to the necessity for protecting that detention, and so arrives at the interdicts. The result is that no connection is apparent between possession and ownership, possessory remedies are as suitable for the non-owner as for the owner, and as the former use is the more striking it has been assumed that it was for the non-owner that possession was introduced. Ihering reverses this. True, possession and ownership are in form distinct, and the interdict differs from the *vindicatio* by the very fact that the question of ownership is excluded; but nevertheless the two run parallel to each other, and it is only by starting from ownership that we can understand the true theory of possession. It is for the sake of the owner that the interdicts are granted, and when, passing on from this we enquire what is the relation to the thing which shall constitute possession, we find it not in physical control, but in the fact that it is the external, visible form (*Thatsächlichkeit*) of ownership. The one theory, beginning with physical control, passes on to the interdicts and then finds that the right to these may or may not coincide with ownership: the other, starting from ownership, passes to the interdicts, and then finds that the right to these may or may not coincide with physical control. It is clear that this difference is fundamental, and it may be worth while to point out what I conceive to be the reason of it.

Of course, neither theory is to be found explicitly stated in the Roman law; in each our authors try to grasp the real principles, whether expressed or not, which guided the decisions of the jurists and to erect these into a system, but their points of view are diverse. Savigny deals with the ideas from which the Romans started, and by which they were in fact guided, except when the pressure of facts compelled them to inconsistency. Ihering, on the other hand, has picked out the principles to which they were tending, and by which alone the development of their rules can be understood. He looks in fact more at the real grounds of the decisions and less at the expressed grounds, obviously a dangerous course if pursued in isolated cases, but safe and instructive if it at once reconciles a number and is in harmony with the general tendency of the law.

Now from the cases it is clear that the jurists strained every nerve to ensure that, whatever defects there might be in *corpus* and *animus*, an owner should not be left without possessory remedies. For this we need only refer to the fact, as to *corpus*, that possession could be acquired by a runaway slave [2], and as to *animus*, that

[1] Der Grund des Besitzes-schutzes, p. 143. The references, when not otherwise stated, are to this work.

[2] D. 41. 2. *de poss.* 1. 14; 50, 1.

lunacy was no irremediable bar to possession[1]; indeed, according to some, this could even be acquired for a '*hereditas jacens*[2].' The acquisition indeed was in each case made by an agent, but this fact could not in strictness dispense with the *animus* of the principal. It may be possible to explain these and similar cases by the doctrines of *custodia* and presumed intention; but the real motive for the straining of the cases, continually shown by decisions '*causa utilitatis*' or based upon a *jus singulare*[3], appears to lie in the necessity of insuring to an owner the use of possessory remedies in defending, and the advantage of usucapion in confirming his title.

Again, for the general tendency of the law we may refer to the manner in which possession proper was confined as far as possible to an owner real or pretended. With us the term possession has acquired a wider meaning, but in its old exclusive form of seisin we have the same intimate connection with ownership. Nor is it difficult to understand why the restriction was maintained in Roman law, and why possession as a legal institution acquired such peculiar importance. We probably associate the term too much with possessory remedies, and the mysterious manner in which quasi-possession is treated blinds us to the fact that these remedies extended far beyond possession in the technical sense. In reading the theory of the subject we can hardly resist the impression that they belong properly to the possessor who holds as owner and that other cases are quite exceptional. That such remedies were originally given in favour of the owner is very probable, but it is certain that the Roman law gave them to the mortgagee and to that peculiar tenant-at-will known as the *precarist;* while as the necessities of life made themselves felt, a similar privilege was allowed in other cases also. The most noticeable feature is that they were never extended to the ordinary lessee of land or the bailee of movables. It would seem that where there existed a relation of contract between the occupier and the owner, it was considered sufficient for the owner to regain possession and for the occupier to look to his contract for indemnification. And where the notion of contract was excluded by a servile status he was granted at least so much protection as seemed to be really necessary; thus the *colonus* was allowed to bring the interdict *quod vi aut clam* for damage done upon the land[4].

But where there was no such contract or where it would have been impossible or inconvenient for the occupier to rely upon it, the possessory remedies were granted. Thus the usufructuary,

[1] D. 41. 2. *de poss.* 1. 5.
[2] D. 41. 3. *de usucap.* 44. 3.
[3] See *de poss.* 1. 14; 44, 1: *de usucap.* 44. 3; and many other places.
[4] D. 43. 24. *quod vi* 12.

who had nothing to do with the owner, had the interdicts *de vi*[1] and *uti possidetis*[2]; while the tenant by emphyteusis who was really an owner with a rent-charge issuing out of his land, and the tenant of the *ager vectigalis*[3], were allowed to have possession proper. But as to reconciling all this with the theory of possession, that is another matter. The idea of derivative possession[4] is a purely mechanical one, invented to produce the semblance of consistency where the reality is wanting. This is clear from the fact that it is quite lifeless, confined to a very few cases which really rest upon special grounds, and incapable of being extended to others where it might be usefully introduced. We can only surmise that the original connection of possession with ownership was so close that the extension of possessory remedies to fresh cases was powerless to disturb it. In just the same way in our own law seisin was too closely tied to ownership for the connection to be broken by the extension of possessory remedies to tenants.

But this is not all. Mr. Maitland has shown the influence of seisin on various rules of substantive law[5]. The influence of possession in Roman law was far more extensive, and touched a wide province in which our own seisin has only barely got a foothold. By the side of the possession which the interdicts protected, and which to gain such protection need point to the mere fact of its existence without regard to its origin, there existed a possession which could claim for itself Praetorian sanction. This arose from the changes the Praetor introduced in the law of inheritance. Where he could not avowedly destroy the title of the legal heir, he effected his purpose by granting possession, the *possessio bonorum*, to the person whom changing manners pointed out as having the better claim. This possession naturally corresponded to ownership and would have been turned into it, had not the Praetor's powers been limited. But it conferred upon the possessor the same legal remedies as an ordinary possessor had; he could protect himself by the *uti possidetis* and the *de vi*, with this distinction only that he did not, like an ordinary possessor, run the risk of being defeated in a subsequent *vindicatio*. We must notice too the *bona fide* possession which was protected by the *actio Publiciana*, and by which the strictness of the old law was largely mitigated. In these cases possession was really equitable ownership, and this is enough to account to a large extent for the prominence which the institute enjoyed. But though possession thus included *pos-*

[1] D. 43. 16. *de vi* 3, 13–17. [2] D. 43. 17. *uti poss.* 4.
[3] D. 2. 8. *qui satis.* 15. 1; D. 6. 3. *si ager* 1. 1; and see Savigny on Possession, p. 77 of the English translation.
[4] In Savigny, sec. 25. [5] Law Quarterly Review, Oct. 1886, p. 483 et seqq.

sessio bonorum and *bona fide* possession, yet it was by no means confined to these or any other form of equitable ownership, and it is this mistake which vitiates Prof. Hunter's treatment of the subject[1]. The matter is clear if we consider what a difference the adoption of a similar method would have made in our own ideas of possession. With us equitable interests have grown up under the influence of the Court of Chancery, and this has never had control of the seisin: when therefore it has wished to interfere with the strict legal title it has left the seisin in the legal owner, but has compelled him to allow the actual detention to be in someone else. It is not difficult to imagine how different this would have been had Law and Equity, as in Rome, been under the control of one court. Then, instead of the equitable estate being raised outside of and in opposition to the seisin, it might have been raised upon and by means of it. Every equitable estate, except where the trustee was really appointed for safe custody, would have carried the seisin, and the doctrine of seisin would have had its position in our law correspondingly extended. But in this case no one would have thought of describing seisin as equitable ownership; apart from the seisin which was sanctioned by equity there would still have been the seisin which was simply the actual form of ownership and which might or might not rest upon a legal title.

This, however, by no means exhausts the influence of possession. We may summarise it as follows. It occupied in Roman law the position which seisin would occupy in our own law at the present day, if all ordinary real actions were strictly possessory, if they excluded, that is, the question of title; if delivery of seisin was still the usual form of conveyance; if a large portion of equitable estates rested upon a seisin separate from and opposed to the ownership; if a continuous seisin was necessary to raise a title by prescription, instead of this effect being produced, as it is, by limitation of actions; and, finally, if, as Mr. Maitland has shown was formerly the case, seisin still applied to movables as well as immovables. Now in all these cases possession is closely connected with ownership. Can we be surprised then that in Roman law possession as a technical term was restricted like our seisin to the possession of an owner, real or pretended, and this in spite of the fact that possessory remedies were granted to many occupiers who had rights less than ownership? It is clear then that Ihering's severance of possession from physical control, and his description of it as the actual form of ownership, has much to countenance it both in the actual decisions and in the general form of the Roman law.

[1] Roman Law, pp. 195–222. See on this Mr. Moyle's Inst. of Just. p. 327.

We will now consider more carefully the points in dispute between him and Savigny. The views of the former are taken from his 'Grund des Besitzes-schutzes[1],' which is only one part of the whole work as originally planned. The others were to deal with the juridical nature of possession, the *animus domini*, and the *constitutum possessorium*. So far as I am aware, however, these have never appeared, and as in the case of the 'Spirit of the Roman Law,' the end of one work has been lost in the beginning of new ones. But what we have certainly justifies the author in his description of it as 'an attempt, not merely to correct the current theory of possession in single points, but to shatter it to its foundations and build it up anew[2].'

The whole subject falls naturally into four parts, the historical origin of possession, its actual ground in the developed system of law, the remedies which protect it, and the marks by which its existence is recognised. It may be convenient at starting to contrast the opposing views on each of these points.

It will be remembered that Savigny finds the historical origin of possession in the necessity for protecting the occupants of the *ager publicus*[3]; its actual ground in the delict against the person which a disturbance of possession involves[4]; that in classifying and describing the interdicts he rejects those for obtaining possession, as not being founded on delict[5], and that he denies that there was in later times an extension of possessory remedies beyond the original cases of *vi, clam, precario*[6]; and, lastly, that in insisting on the requirements of *corpus* and the *animus domini*, he extends the *physical control* implied in the former by means of a *custodia*[7] which takes the place of immediate bodily presence, and that he accounts for the undoubted exceptions to the latter by means of the artificial notion of derivative possession[8]. On all these points Ihering joins issue. He recurs to the old teaching that the interdicts sprang from and replaced the *vindiciae* of the ancient *legis actio sacramenti* which regulated the temporary possession of the property in dispute until the case was decided; he sees the actual ground for possessory remedies in the facilitation of proof which owners thereby gain, and which, although it must sometimes help non-owners too, is a necessary completion of their legal position; following out this view, he sees no reason why owners should not be able to obtain possession, as well as to retain and recover it, nor why these remedies should be limited to the old cases of disturbance or loss of possession *vi, clam*, and *precario*; finally, he discards the notion that possession is connected with physical control, he defines it

[1] Jena; 2nd edition, 1869. [2] Preface, p. vi. [3] Sec. 13.
[4] Sec. 6. [5] Sec. 39. [6] Sec. 45. [7] Sec. 18. [8] Sec. 25.

as being the actuality of ownership, and he recognises its existence wherever the thing in question is in a position in which an owner would probably have left it; upon the *animus domini* he only briefly touches, reserving it for the special treatise which he projected.

Upon the question of the historical origin of possession I need not spend much time. It is lost in an obscurity which we can hardly hope to penetrate. Savigny's theory is useful in that it gives legal protection to the holder of public land, and also accounts for the position of the *precarist*. If this last was originally a client holding by his patron's favour, it was necessary both to give the patron the interdict *de precario* against him if he refused to deliver up possession, and also to regard him as a possessor on his own account, since the want of any contract with his patron would otherwise leave him without redress. But apart from its convenience there is very little to support this hypothesis, and it may be noticed that it is just as serviceable if we allow that the institute arose elsewhere, and was only afterwards applied to the case in question, in the same way as at a later date it was applied to *emphyteusis* and the *ager vectigalis*. I have already referred to Professor Hunter's treatment of possession as equitable ownership. Its origin he finds in the legal protection of aliens, but this theory has found no support. There is not even as much direct evidence for it as for Savigny's; it is not necessary in order to explain any gap in the law, and the probabilities are not in its favour. An alien indeed had originally no standing in the ordinary courts, but there is nothing to support the idea that the procedure before the *praetor peregrinus* was limited to interdicts. If this were so, and if interdict process as applied to possession arose there, we may well ask why it was that in this very source and fount of equity the question of *bona fides* was excluded? With no *vindicatio* to fall back upon, there must have been frequent miscarriages of justice, and it would be difficult to understand how such a system exerted that influence on the native courts which is supposed to have led to the replacing of the old *jus civile* by the broader and more enlightened rules of the *jus gentium*.

This very fact of the exclusion of the question of *bona fides* seems to point to the existence of a further remedy behind the interdicts, and if we look at the old theory we shall find abundant reason for regarding it as the safest. There are here at least some facts to go by. Thus we have originally the *vindiciae* or the award of *interim* possession made at the discretion of the Praetor, the favoured party giving security[1]. This was preliminary to the trial of title in the *legis actio sacramenti*. At a later date both of these disappear.

[1] Gaius iv. 16.

In the place of the *vindiciae* we have the interdicts: in place of the *legis actio sacramenti* we have the *vindicatio*. But in what manner exactly the change was effected, we have no means of telling. Is it presumptuous to risk one more suggestion? In the middle ages, when the ordinary possessory action had become vexatiously long, and, owing to the uncertainty of the possession, actual violence often occurred, a more speedy remedy was found in the *summarissimum*, which settled the matter of possession on *prima facie* evidence whenever a collision between the parties was anticipated. May we suppose that in a similar way men resorted to the interdicts in consequence of the delays of the *vindiciae*? Originally, immediate commands of the Praetor in cases where violence had occurred or was imminent, the interdicts became in time formal commands or judgments which were at the service of anyone who could show himself entitled to them. In matters of possession obviously the most natural course was to confirm the actual possessor where he was only threatened, or to restore him if he had been ejected, saving all questions of title till the trial. If this is sufficiently probable, we can understand how, when the *legis actio sacramenti* was replaced by the *vindicatio*, the interdicts would be sufficient to take the place of the *vindiciae* without any other substitute being found for them. This of course is mere conjecture, but it gives a probable reason for the exclusion of the question of *bona fides*; and if this procedure was afterwards extended to the case of the *ager publicus*, we can understand how here again title and *bona fides* were equally excluded.

So far, perhaps, we have not got much satisfaction. What then shall we say as to the actual ground of the protection of possession, that which justifies its existence and guides its development in the mature system of law? At first sight we shall expect still less from any such enquiry. Mr. Justice Holmes has briefly summarised what the civilians have said on the matter, but for him the trail of the metaphysician is over it all, and he hastens from Bruns's yearning for an 'inner juristic necessity' to find refuge in the humble, though sure ground of expediency which he sees in the common law. But perhaps even this is delusive. 'It is quite enough,' he says, 'for the law that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again[1].' Now this seems very plain and simple, yet we can only be sure of its application when the claim to possession is founded on either a legal or a moral title. We must indeed distinguish the cases. First, we have the owner, whose fuller right, of course,

[1] Common Law, p. 213.

carries with it the claim to possession. Next we have the *bona fide* possessor, including one who thinks he has a good title when in reality he has none, and one who has found a thing, the owner of which is not known. The protection of these is founded upon their moral claim. I may refer to the case of the little sweep-boy, Armory [1]. It is as reasonable to place the ultimate ground of the verdict which gave him back the jewel in the sympathy his case excites, and the moral claim he is felt to have, as in any fear of the legislator that if such a verdict is denied, violence will ensue. But when we come to a possessor who has no such claim, it is a mere accident whether the law does or does not protect him. In the case of the thief it might be thought better to risk violence rather than to show him any favour, yet the Roman law gave him protection. Curiously enough though the English law, with all its care for mere occupiers, has no help to give to a tenant on sufferance [2]. The fact is that violence is to be chiefly apprehended when the law will not help those who have right on their side. Mr. Justice Holmes shows a certain recognition of this when he attempts to refute Ihering's theory by remarking that it is probably not true that the title of disseisors is worse than that of disseisees [3]. In an unsettled state of society very likely not, but when possessory remedies are easy and expeditious, the truth of this may be doubted. Violent proceedings by persons entitled are then rare, and as a matter of fact the actual possession is, in the vast majority of cases, united to ownership or other inferior rights. Perhaps the grounds of the protection of possession are really more composite than is implied in the above quotation. Something must be allowed for the desire of the law to favour persons with a legal interest, something for its willingness to turn a mere moral claim into a right, and something for its desire to repress violence and protect the person.

If we return now to the Roman law, it may be possible to settle, at any rate so far as it is concerned, what theory as to the ground of the protection of possession will most consistently explain the tendency of the cases. We will restrict ourselves to three leading ones which may be associated with the names of Bruns, Savigny, and Ihering. These may be divided into absolute and relative. According to the former, possession is protected for its own sake; according to the latter, only for the sake of some other right which thereby attains greater security or value. The chief of the absolute theories rests the protection of possession on the ground of the freedom of the human will. The individual will, when in harmony with the general will, is equivalent to ownership; when acting

[1] *Armory* v. *Delamirie*, 1 Sm. L. C. 357.
[2] 1 Tudor's L. C. on R. P. p. 10.
[3] Common Law, p. 208.

alone, it amounts only to possession, but even then it has a substantial value which in the interest of freedom requires to be protected. As Bruns says, 'it is in the protection of possession that the personality and freedom of men first arrives at complete legal recognition[1].' This view has probably had more influential supporters than any other, but it is easy to show that it has no foundation in the actual decisions of the Roman law. Neither this nor any other body of law knows anything of the absolute freedom of the will, except so far as it keeps within legal bounds. When it asserts itself outside of these, it has universally been met by compulsion of some kind, and whether this compulsion has been applied by the State, representing the general will, or by another individual will, has been at all times a matter of history and convenience[2]. Accordingly, we find this idea useless to explain the actual scope of the interdicts. It does not explain why they were given to the owner, but refused to the *detentor alieno nomine*; for the freedom of the will of the lessee or of the borrower was as much violated when he was deprived of possession as when the owner was. It does not explain the most frequent use of the *uti possidetis* in which there was no question of violation of anybody's will, but simply a dispute as to which of two parties had the better claim to possession. Perhaps it is hardly necessary to say so much as this in refutation of the idea, so great is the tendency with us to look upon it as quite impracticable. Yet it has an element of truth which we need not cast aside. I have surmised above that possession really does, according to common notions, give a good title as against all except those who have a legal interest in the thing, and that in protecting it the law only acts upon common notions of justice. But if we go further and ask why our sympathies are with the possessor, we shall find either that they are due to our hatred of oppression (as Windscheid says, no subject must exalt himself above another[3]), or to our recognising that *within its proper sphere* the will must be free. The German theory omits this restriction, but indeed we have little sympathy, if any, with the possession of the thief, and if this is protected, it is probably on historical grounds merely, as the violation of public order could be punished in other ways. Whatever truth, however, there may be in this view, it neither fits the Roman law, nor does it give any clue to its development, and without these qualities it is of no use to us.

Passing then to the relative theories, we may confine ourselves to those identified with Savigny and Ihering. Savigny says that

[1] Recht des Besitzes, § 58, quoted by Ihering, p. 30. [2] P. 33.
[3] Pandektenrecht I, 397, n. (6).

violation of possession is a wrong done to the possessor. Hence his remedy arises *ex maleficio*, and possession must be put under the head of obligation. Ihering takes quite a different view. Possession is a necessary completion of ownership; it exists in the interest of owners in order to facilitate proof of title. The rule is that ownership and possession go together, and hence justice will in general be most rapidly done by dealing in the first instance with possession only. There is much in this that fits the actual Roman law, and shows how the cases where they differ may be reconciled. This merit at least it has, whether it is or is not strictly true. But before saying anything in its support, I will briefly point out the untenability of Savigny's position.

Mr. Justice Holmes thinks it enough to say that it cannot account for the interdict *de precario*, for in fraudulent withholding there is no violence[1]; but this will not do, for it is generally admitted that a delict may be committed by fraud as well as by force. It is easy to find surer grounds of objection. If the element of delict is the chief thing, then the right to the interdicts must not be affected by the nature of the possession, either as regards the person or the thing, and further they can only be granted in case of injury done or threatened. But none of these requirements are complied with in the Roman law. It makes all the difference in what right a man is possessing[2]; violence done to a tenant or bailee has in this way no remedy; only the owner it is who can gain redress for the violence done to him. It is beside the point to say, as Savigny does, that the tenant's claim on the owner gives him all he wants. A man who has been assaulted does not care to go to another to beg that redress may be obtained. And indeed so far as the element of delict is really admitted the tenant has his full share of legal redress. For damage done he has the interdict *quod vi aut clam*[3], and for theft he has the *actio furti*[4] and the *actio vi bonorum raptorum*[5]. It is only when he relies on possession pure and simple that the law fails him. A similar result is produced by the special legal qualities of the person possessing[6] and the thing possessed[7]. Let a *filiusfamilias* be in possession, and upon ejectment he has no possessory remedy: yet so far as a delict is committed the law is careful to protect him, for he has both the *actio injuriarum* and the interdict *quod vi aut clam* specially allowed him[8]. Hence we cannot plead his general legal incapacity. So too if a man is possessing a *res sacra* or any other thing *extra commercium* and is ejected, the law cares nothing for his possession.

[1] Common Law, p. 207.
[2] P. 9.
[3] D. 43. 24. *quod vi*, 12.
[4] D. 47. 2. *de furtis*, 10.
[5] D. 47. 8. *vi bonorum*, 2. 22.
[6] P. 14.
[7] P. 13.
[8] D. 44. 7. *de O. et A.* 9.

But the case becomes stronger when we look at the distinction between the *bona fide* and the *mala fide* possessor[1]. So far as possession goes, the Roman law knows no difference between them: but come to delict and it is on the alert to give the thief no favour. He is denied both the *actio furti*[2] and the *actio legis Aquiliae*[3]. Clearly the notion of delict did not guide the lawyers in these decisions. And when we look at the interdicts themselves this essential element is equally lacking[4]. Savigny tries indeed to show that it is always present. For that purpose he avails himself of the violence which he says by a fiction precedes the *uti possidetis*[5], and refers to the fact that it is limited to a year. But the fiction, if it really existed, and this is very doubtful, should not be brought in when we are seeking the *actual* ground of possessory remedies, and the latter circumstance was usual in praetorian actions. The case too is clear with regard to the interdict *utrubi*, for so little did this involve in itself the notion of delict that it lay against third persons also to whom the possession had been transferred[6]. It may be noticed that the words *vim fieri veto*, upon which Savigny relies[7], do not refer to a previous violence, but are simply the common prohibition of violence contained in the judgment.

The result then is, as Ihering points out[8], that if the interdicts were really founded on delict, they were denied to those, e. g. the tenant and *filius*, to whom they should have been given, and they were given to the *mala fide* possessor to whom they should have been denied: while moreover the requirement of delict, which should be universal, is in some interdicts conspicuously absent.

If then there are these objections to Savigny's theory, let us turn to Ihering's and see what we can make of that. According to him the possession of the non-owner is a mere corollary to the possession of the owner, it being the latter possession which justifies and gives the key to the interdicts. His position is expressed as follows: 'The protection of possession as the actuality of ownership is a necessary complement of the protection of ownership, a facilitation of proof granted to the owner which necessarily serves the non-owner also[9].' The amount of proof required from an owner varies: if he is bringing a *vindicatio* he must prove his title strictly; if he is bringing an action for the damage or loss of his property, such as the *condictio furtiva* or the *actio legis Aquiliae*, this proof is not required, but it is left to the defendant to object and show, if he can, the plaintiff's want of title; but in a possessory interdict neither is the plaintiff bound, nor is the defendant allowed, to raise

[1] P. 15. [2] D. 47. *de furtis*, 12. 1. [3] D. 9. 2. *ad leg. Aquil.* 17.
[4] P. 17. [5] Possession, p. 303. [6] This follows from Gaius iv. 150, 151.
[7] Possession, p. 303. [8] P. 21. [9] P. 45.

the question of title. That is altogether irrelevant. 'It is then this exclusion of the question of ownership which impresses on possession its peculiar character[1].' Mr. Justice Holmes objects to this, that it supposes the proof of title to be inordinately difficult[2]: but we must remember that in practice the popularity of possessory actions has lain not only in the facilitation of proof they grant, but also in the superior quickness of their procedure. Whatever reason we may assign for it, however, the fact remains that in Roman law the question of title was rigorously excluded. But this means that the non-owner may prevail over the true owner. Thus we come to the peculiarity which has excited most attention. Possession has been treated as though in giving it protection there had been some special design in favour of the non-owner[3], and hence many of the current errors. But clearly this arises from a confusion between the intended and the non-intended results of legal institutions[4]. The design was that the possession of the owner should be easily protected; that the possession of a thief may also be sometimes protected, even against the owner, resulted indeed from the carrying out of the design, but was no part of it.

In order to give clearness to the subject, Ihering enunciates the points for which he contends in a series of propositions, which may be summarised as follows[5]:—

1. The protection of possession is designed not for the sake of the thief, but of the owner, and as a rule it is the owner whom it benefits.

2. The benefit which it confers is the facilitation of proof, and since this requires the exclusion of the question of ownership, the non-owner necessarily benefits also.

3. Possession therefore in its practical bearing is rightly described as an outwork of ownership. Here, so long as he can maintain it, the owner defends himself.

4. But the advantages which possession thus confers give it an economical value, and this accounts for the fact that there may be controversies about retaining it, apart from any notion of violence, and controversies too about obtaining it.

It is on this last point that a serious divergence from Savigny's view takes place. In the Roman jurists he meets with a threefold division of possessory interdicts; they are for obtaining, retaining, or recovering possession[6]. But of the first class he can make nothing. If a man has never been in possession, how can he be tortiously deprived of it? Regarded from Savigny's point of view this is conclusive, and so he at once rejects the division of the Roman law[7]. But if,

[1] P. 53. [2] Common Law, p. 210. [3] P. 59. [4] P. 55.
[5] P. 62. [6] D. 43. 1. *de interd.* 2, 3. [7] Possession, p. 290.

with Ihering, we see the mark of a possessory remedy in the exclusion of the question of ownership, it is as applicable as much to gaining possession as to recovering it, and so we find ourselves in harmony with the Digest.

I have already said that the value of any such theory as the above depends on the assistance it gives us in understanding the law: it must be consistent with the actual decisions, and, more than this, it must explain their tendency. If then it be correct, these marks must appear in both of the two departments to which I have referred above; the interdicts, and the nature of possession.

And, first, as to the interdicts. That the Roman jurists did in fact regard possessory remedies as merely preliminary to the question of ownership is clear from many passages[1], and is very noticeable in the fact that when an interdict is not thus preparatory, but really settles the matter once for all, they are careful to say so[2]. And that they regarded them as primarily meant for the owner is clear from the manner in which an interdict is sometimes given to a possessor, *even though* he is not the owner (*vel non dominus*)[3].

But now if possessory remedies did take the place here assigned to them, there are two points in which we may test the matter. Were possessory remedies given to the heir, or was he always driven to proof of title: and were they given not only for disturbance *vi, clam, precario*, but in case of any wrongful withholding of possession? If the interdicts did really give that support to the owner which Ihering asserts, then to be complete they ought to avail for the heir also, and they ought to provide against all kinds of disturbance of possession. As to the first point, we must notice that there was the interdict *quorum bonorum* for obtaining possession of the whole inheritance, but this could be used only by the praetorian heir. We find what we want, however, not in an interdict at all, but in the *hereditatis petitio* which served the same purpose[4]. Here the heir recovered on proof of his testator's possession and his own title as heir; we have thus the essential feature of a possessory remedy in the exclusion of the question of ownership. Of course, the action only lay against another person who held *pro herede*, or a mere intruder holding *pro possessore*[5]: but in this point it corresponded to the ordinary interdicts. In the first case, there was a question as to who had the better claim, as in the *uti possidetis*; in the second, there was a totally unjustifiable intrusion

[1] Gaius iv. 148; Inst. iv. 15. 4; D. 43. 17. *uti poss.* 1. 3; D. 41. 2. *de poss.* 35 C. 8. 1. *de interd.* 3; C. 3. 32. *de R. V.* 13.
[2] D. 43. 20. *de aq. cot.* 44.
[3] D. 43. 16. *de vi*, 8.
[4] Pp. 85–90.
[5] D. 5. 3. *de H. P.* 9; 11–13 pr.

as in the *de vi*. Upon the other point there is also a satisfactory answer. It is clear that if, as Savigny says, possessory remedies are founded on delict, they may properly be limited to disturbance *vi, clam, precario*; but if, on the other hand, they are meant to help the owner to his possession, there is no reason why they should not avail also in such a case as a withholding of possession by mistake. Hence the importance of deciding whether any extension of the idea of *vis* did in fact take place. Savigny strongly denies it; Ihering as strongly maintains it. We cannot here enter into the details of the discussion[1]. It turns upon the nature of the *actio momentariae possessionis*[2]. Is this simply a new name for an old remedy, or does it mark a further development of the protection of possession? Ihering maintains the latter view to be correct, and chiefly on the ground that there are four different cases where a possession which had not been lost by violence could nevertheless be regained[3]. These are where it is lost by mistake[4], by the fraud of an agent[5], by illegal judicial award[6], and by the occupation of the land of an absent owner[7]. As to the last of these cases we may notice that in order to recover possession by the *de vi* there must under the old practice have been either an actual entry of the owner repulsed by violence, or he must have abstained from this through fear. Either course was inconvenient, but unless the plaintiff could prove either his own defeat or his own timidity he could not have the *de vi* and was helpless. This defect was probably remedied by the *actio momentariae possessionis*.

But the extension of possessory remedies beyond the requirements of *vis* was strictly logical. The original limitation to *vi, clam, precario*, simply marked the original cases in which it was found necessary to use the interdict; but as the idea of *vis* in the *Lex Aquilia* was gradually extended, so it appears to have been with the *vis* of the interdicts, or at any rate equivalent remedies were found in which the idea took a larger meaning. If then we consider what was the foundation of possessory remedies to which the Roman law was tending, we shall find it, not in the old limitation to *vi, clam, precario*, but in the more general formula, 'appropriation of possession against the will of the owner[8].'

We have still to consider the theory as applied to the nature of possession. Does it give us any help here, and especially does it explain how possession, which is supposed to be founded on physical

[1] Pp. 102–112. [2] C. 8. 4. *unde vi*, 8. [3] P. 112.
[4] C. 8. 4. *unde vi*, 5. [5] C. 7. 32. *de poss.* 12.
[6] C. 8. 5. *si per vim*, 2; C. 3. 6. *qui legit.* 3. [7] C. 8. 4. *unde vi*, 11.
[8] P. 132. We might almost say, in the terminology of the Common Law, that there is a movement from the idea of trespass towards the idea of conversion.

control and intention, is yet able to dispense so easily with these requisites? To answer this question we have only to point to the complete parallel that exists between possession and ownership, and which enables us to define possession as the actuality of ownership, an actuality which may or may not be associated with physical control and real intention. The resemblance, as Ihering points out, exists in two directions; it is extensive and intensive [1]. Extensively the limits of possession and ownership exactly correspond; where there is ownership there may be also possession, and where there is no ownership there can be no possession. Take the case of a *filiusfamilias*, whose father dies abroad; while he is living the son can neither own nor possess; but the moment he is dead the son can both own and possess, although it is clear that until the news is brought there can be no change in his physical or mental relation to things [2]. So too joint-possession, which is so hard to understand on the current theory, is explained at once when we approach possession from the side of ownership. And the resemblance is intensive also, i. e. for the nature of possession we must examine the nature of ownership. In the marks which show the actual exercise of this we shall find the marks for the existence of possession.

Let us remember for a moment the explanation which Savigny gives of *corpus*. Without entering into details, this means an immediate power of dealing with the thing. Hence, in general, to gain possession personal presence is necessary. This however may be dispensed with by the doctrine of *custodia*. A thing put into my house is under sure control and awaits only my pleasure for me to use it. By these two tests, immediate power of dealing and sure control, we can certainly explain most of the cases, but there are notable exceptions. I have possession of a wild beast caught in my trap, yet the *custodia* here seems to rest on but little actual ground [3]. I find a treasure in my garden; it has been opened to view; but my immediate power of dealing avails me nothing unless I actually move it [4]. It is to be noticed, too, that in support of this test Savigny presumes bodily presence when nothing is said about it and where, as will appear later, it may well be dispensed with [5]. The doctrine of *custodia*, moreover, is applied in but a half-hearted fashion. Is it not applicable to my garden, or to any land which I am even temporarily occupying as much as to my house? Do not I get possession of the straw placed on my farm, or of the materials brought to a building site? And why does

[1] P. 144.
[2] D. 41. 3. *de usurp.* 44. 7.
[3] D. 41. 1. *de A. R. D.* 55; cf. Dr. Walker's edition, p. 54 n.
[4] D. 41. 2. *de poss.* 3. 3; 44 pr.
[5] Possession, p. 154 (6).

not the delivery of the key of a warehouse give me possession by *custodia* without the necessity of my being present at the warehouse? It is clear that immediate power of dealing is not always enough, that the doctrine of *custodia* is capriciously applied, and that possession may arise where both tests, as usually employed, really fail.

But consider now the loss of possession, or, which for our purpose is the same thing, its continuance. Savigny applies to this a kind of *vis inertiae*[1]. According to him, if there is the power to reproduce at will the original physical relation, possession continues although its foundation in fact may be quite gone. To this it may be objected that possession is often allowed to continue when there is in fact no power to reproduce at will the original physical relation. I do not lose possession of things which I have left in my hut on the Alps, although it may be quite inaccessible. Ihering puts the case of the road to an estate being interrupted by the breaking of a bridge[2]. No one would say that possession was lost, and if we dismiss this as being merely a temporary obstruction, the answer is easy that in other cases a temporary loss is quite enough to put an end to possession. Take again the case which is the most signal exception to Savigny's rule[3]. In my absence my land is occupied by another, but there is no loss of possession until I have had a chance of entering by force, although the uselessness of my attempting this may be clear.

But now if we abandon the idea of physical control and look at possession as being the actuality of ownership, we see that it must be equivalent to any usual external condition of the thing in which it serves the purposes of an owner[4]. This test therefore will be applied in a different manner to different things. I am at work in the forest and leave my tools there over-night. My possession is not interrupted. But if, as I am passing through, I drop my purse, in this case it is. The matter depends entirely upon the actual conduct of the ordinary owner. Some things he leaves at large, as tools in his garden, boats upon the shore; others are kept in the house, as money, jewels, books. Let either be left in a position which no longer points to him as the owner and his possession is at an end. And if to this it is objected that physical control and *custodia* are our only guarantees for the safety of possession, it may be answered that its real security depends more upon the protection given by morality and law-abiding habits than upon any *custodia* with its bolts and bars.

Ihering exhibits his views on this matter in a series of propositions which we may summarise as follows[5]:—

[1] P. 174. [2] P. 169. [3] Possession, p. 261.
[4] P. 179. [5] P. 181.

1. The Roman law recognises possession in many cases where there is neither personal oversight, nor are any special measures taken for its protection. Frequently there is no real possibility of resuming physical control at will, and, when there is, it depends more upon the legal and moral elements in possession than upon any actual *custodia*.

2. In certain cases the legislator has to decide upon what external relation shall constitute possession, quite apart from the existence of physical control.

With this maxim we may compare the remarks of Mr. Justice Holmes on the rules which the courts apply to the capture of whales[1].

3. The interests of ownership forbid that possession should be tied down to physical control or *custodia*. To maintain the latter might involve quite useless trouble.

4. But in fact possession of things is simply the actuality of ownership.

5. Hence its external form varies for different things, and its existence in each case is a matter of experience, a question of every-day life.

6. Tested in this way it is much more easily recognised by third persons, and the visibility we ascribe to it has the greatest influence on its security.

For his view as set out in these propositions Ihering claims full justification on the ground of its legislative necessity, its practical applicability, and its coincidence with the Roman law. In each respect possession starts from ownership, and the key to it is to be found in describing it as the actual visible form which ownership assumes. There is an expression in the Roman law which fits this view exactly, and gives us a brief motto for it. A passage in the Code sums up the condition of one who is asking for a possessory remedy in the following words: 'Cum ipse proponas te diu in possessione fuisse omniaque ut dominum gessisse[2].' This is exactly the idea upon which Ihering maintains that the Roman view of possession was founded; *omnia ut dominum gessisse*[3]; and to which, as I have pointed out, it is at least probable that it was tending.

This being the theory, how does it fit the cases? How, that is, does it suit the conditions for the acquisition and loss of possession as shown in the Roman law? If possession is the actuality of ownership, then clearly it exists when acts of ownership are exercised. This, however, is more suitable for immovables: with regard to movables it is enough if they are put in a position proper to ownership. There must indeed be an intention to own on the

[1] Common Law, p. 212. [2] C. 3. 32. *de poss.* 2. [3] P. 193.

part of the possessor, for otherwise he could not be distinguished from the tenant or the bailee, but this is presumed until the contrary is proved. And so even where it cannot exist, as in the case of a lunatic[1], the intention of an agent is allowed to be enough, although this is in violation of the rule of law which requires intention in the principal. We see then that even a proved want of intention was no bar where such intention could not possibly exist. Thus presuming the intention, a packet delivered at my house is delivered to me, but not if left outside upon my land, while, on the other hand, a load of straw is delivered if placed upon my land.

But acts of ownership are intermittent, and the above gives us no sure way of fixing the moment when possession begins. Hence the importance of the act of apprehension[2]. It is enough if I show my intention to own under circumstances which make it likely that I shall be able to follow up the intention with acts of ownership. This depends upon whether there is or is not a predecessor in the possession, and if there is, upon his attitude to me. Thus if the thing is vacant, I possess at once; if it is occupied, I possess when the occupant either voluntarily or by force or otherwise yields it up to me. Hence if treasure is found in my land, I possess so soon as by moving it I have definitely shown my intention. I am now visible to the world as owner. If I take forcible possession of an estate, I do not possess so long as the owner resists, and a mere temporary cessation of the resistance does not avail me; for if he withdraws and forthwith returns with more help and expels me, I have never been in possession[3]. But the most ordinary case is that of a peaceable transfer of possession. Here all that is necessary is a public declaration by the old possessor of his intention to resign, and by the new possessor of his intention to take the possession. This is usually done by verbal declaration on the spot, but of course any other method which gives the required publicity would do as well, such as registration in public books. It is now clear to the world that acts of ownership on the part of the new possessor will follow. This shows that the constructive possession by registered bargain and sale under the Statute of Uses was more than a mere fiction.

Are we not now though distinctly in advance of Roman law? Was delivery in fact ever allowed by writing in the absence of the parties? Possibly it was in the case of slaves, and so we may interpret C. 8. 53, *de donat.* 1. A similar step was taken by Justinian with regard to stipulations[4]. But most important is the fact that

[1] D. 41. 2. *de poss.* 1. 3. [2] P. 197. [3] D. 43. 16. *de vi*, 17.
[4] Inst. 3. 19. *de inut. stip.* 12.

we can now include in our rule the case of land occupied in the absence of the owner. Here we have an intention to possess, but the necessary probability that acts of ownership will follow, so as to exhibit the new possessor to the world as owner, is not assured until the old possessor has either attempted unsuccessfully to regain possession, or the lapse of time, after the news has reached him, shows that no such attempt will be made. Thus here, as in delivery, the new possession depends on the conduct of the previous possessor.

As to the loss of possession, Ihering's theory shows to still greater advantage. If possession is the actuality of ownership it must cease so soon as this actuality ceases, so soon therefore as the things are no longer in a situation suitable to ownership. With regard to movables this means that to retain possession they must be in my keeping, whether I use them or no: but as to immovables this test hardly applies; we must look to the possessor rather than the thing, and if he is to appear to the world as owner he must not omit for an unduly long time to exercise acts of ownership. So far from the possessor being able to rely upon Savigny's *vis inertiae*, he must use diligence to maintain his possession. In this conflict of opinion what do the sources say? As to movables Papinian expressly says that possession is lost when the custody has ceased to exist (*neglecta atque omissa custodia, quamvis eas nemo invaserit*[1]), in this following Nerva. So, again, Paul quotes the same jurist in support of the view that to maintain possession there must be an actual custody except in the case of slaves[2]. The same idea is expressed with regard to immovables too, where the loss of possession is in some passages ascribed to the owner's neglect[3]. As to what constitutes negligence a certain latitude, indeed, is allowed him; thus when a colonus dies, possession is not lost immediately, but the owner has a reasonable time within which to enter[4]. But we are expressly told that possession is in all cases ultimately lost both by negligence and by long absence[5]. It is provided, moreover, that long absence through well-grounded fear shall not prejudice the possession[6]. This of course means that in ordinary cases the lapse of time is important. We may notice also the '*post tempus*' in the passage relating to stones lost in the Tiber[7], and to the effect on my possession of my allowing a slave to live for a long time (*diu*) in freedom[8]. From these passages it is quite evident that possession is not continued by a mere *vis inertiae*, but lasts only so long as it is in fact the external visible form of ownership.

[1] D. 41. 2. *de poss.* 47.
[2] Ibid., 3. 13.
[3] Ibid., 40. 1; D. 41. 3. *de usurp.* 37. 1.
[4] D. 41. 2. *de poss.* 40. 1.
[5] D. 41. 3. *de usurp.* 37. 1.
[6] C. 7. 32. *de poss.* 4.
[7] D. 41. 2. *de poss.* 13.
[8] D. 41. 2. *de poss.* 3. 10.

It seems then that Ihering's theory that possession continues only so long as the possessor appears to the world as owner, explains a number of cases which are inconsistent with Savigny's view; and although the jurists never expressed this as the principle of their decisions, yet the necessity which they were under of finding possessory remedies for owners in all cases compelled them continually to approximate to it. But if we grant this, and it is quite enough to show the value of the theory as giving a key to the cases, we need not at the same time attach the importance Ihering does to the facilitation of title that possessory remedies give. Mr. Justice Holmes points out, as I have already stated, that this supposes proof of title to be inordinately difficult, which is by no means always the case[1]. At any rate such facilitation has not been made an object in our own law, which does not exclude questions of title from being raised in possessory remedies. So far, however, as possession does form the final ground of decision in a possessory action, it is possible that the criterion adopted by Ihering may be usefully employed in both systems. Take the cases which Mr. Justice Holmes mentions, and ask who is apparent to the world as owner. A pocket-book was left on the barber's table[2]. A third party might well suppose this to be the barber's, and so it was held that he was in possession. A pocket-book was dropped on the floor of a shop by a customer and picked up by another customer[3]. Here the shopkeeper would hardly be said to be the apparent owner, and so the finder first got possession. So far the tests agree. But there is another case of the finding of bank-notes hid in a crevice of a safe which had been lent to the finder[4]. Here the finder was held to have possession, though on grounds with which Mr. Justice Holmes does not agree. But according to our test the notes, being in an unusual position, did not raise a presumption of ownership in the lender, and so he had no possession.

We have said that the *animus domini* is in general presumed. Of course in Roman law it might be shown that the occupier held as tenant or bailee, and then, however much he might appear as owner, the possessory remedy would be denied him. But a person holding by precarium, by emphyteusis, under a mortgage, or as sequester, was not liable to this disadvantage. We have simply then to extend this list to include tenants and bailees generally, and we are in English law. Possession therefore should be allowed wherever the possessor's relation to the thing would strike

[1] Common Law, p. 210. [2] *McAvoy* v. *Medina*, Common Law, p. 222.
[3] *Bridges* v. *Hawkesworth*, ibid., p. 221. [4] *Durfee* v. *Jones*, ibid., p. 225.

a third party as either ownership or any other right in the thing involving the actual use or custody of it. Whether this criterion can really be justified in English law it is beyond my province to enquire. But whether the guiding motive of the Roman law was that owners required a facilitation of proof, or whether it lay simply in the fact that possessory remedies were most usually employed, it seems quite clear that possession was in general regarded as an owner's possession, that its nature was settled really in accordance with the requirements of ownership and not on the basis of physical control, and that it was only exceptionally that it lent its services also to the non-owner. That possession as a rule coincides with physical control, by oneself or by an agent, is of course clear, but the above treatment of the subject may at least explain why it was so often divested of this element, and allowed to exist as a purely juridical notion.

JOHN M. LIGHTWOOD.

COMPENSATION FOR MISDESCRIPTION IN SALES OF LAND.

CONSIDERABLE variation is noticeable in the practice of the Courts of Equity in granting compensation to a purchaser for a misdescription innocently made by the vendor in a contract of sale of real property. This has been caused partly by the fluctuation of feeling as to the propriety of substituting new contracts for the contracts made by the parties, partly by the fact that the Courts, in following prior decisions, have not always distinguished between cases in which the vendor sought to have the contract enforced with compensation for the misdescription and cases in which the purchaser was the party desiring to have compensation granted, and partly also from the variety of opinion necessarily to be found on the Bench when such questions are asked as, 'Does the misdescription relate to an essential matter?' and, 'Can compensation be fairly assessed?'

An examination of the cases will, however, the writer ventures to think, show that the following rules are usually observed by the Court in granting compensation.

First, in the absence of any previous agreement between the parties:—

1. The Court will, at the desire of the purchaser, rescind the contract if there has been an essential misdescription, although the vendor would prefer to complete giving compensation.

2. The Court will, at the desire of the vendor, decree partial performance with compensation, if the misdescription was non-essential [and if compensation can be fairly assessed], although the purchaser would prefer to abandon the contract.

3. The Court will, at the desire of the purchaser, decree partial performance with compensation, although the misdescription was one which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract, provided that the misdescription was contained in the written contract and that compensation can be fairly assessed. If the misdescription was not contained in the written contract, the purchaser's only remedy is rescission. If the misdescription was contained in the written contract, but compensation cannot be assessed, the purchaser may [at his option] rescind [or accept an indemnity (?)].

Strictly speaking, the words, 'abatement of purchase-money,' should be used instead of 'compensation;' but the ordinary phraseology may be retained, as there is no ambiguity in it.

The words 'essential' and 'non-essential' in the above rules need definition:—

An 'essential misdescription' is one whereby the purchaser was induced to purchase something which, but for such misdescription, he would never have purchased at all.

A 'non-essential misdescription' is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The words 'essential' and 'non-essential' represent the expressions 'very material,' 'substantial,' 'substantially and materially different,' 'very exaggerated description,' and 'small,' 'trifling,' 'infinitesimal,' 'slight variation,' 'minor and subsidiary,' which are to be found in the cases. In a former number of this REVIEW[1] Mr. Bigelow suggests that where mistake has been made with reference to an agreed term of a contract, the question of the materiality of the term ought to be excluded; 'the parties,' he continues, 'by making it a subject of agreement have made it material, and the Courts have no right to put a different construction upon it.' The term mistake as used in the article quoted would include misdescription arising from mistake on the vendor's part. Tested by Mr. Bigelow's suggested principle, all misdescriptions contained in the written contract even though innocently made would seem to be material. Whether the suggested principle is applicable to ordinary mercantile contracts, or not, it certainly is inapplicable to contracts for the sale of land, especially the usual contract entered into upon a sale by auction, and consisting of particulars and conditions of sale and a memorandum. In such a contract many clauses are obviously ancillary, and therefore rightly treated by the Courts as non-essential; thus, for instance, conditions as to time are considered as not 'of the essence of the contract' unless it is so stipulated, or to be inferred from the circumstances. Further, a vendor in describing real estate is so exposed to error, on the ground of wrong measurement, or of defect of title unknown to or forgotten by him, that it would be manifestly unfair to rescind the contract for some slight mistake which could, perhaps, only have been avoided by an expense disproportionate to the value of the property sold; and the 'want of mutuality,' an evil which cannot always be avoided in the rescission or enforcement of contracts, would appear more glaring if the purchaser were allowed to rescind or complete at his option, whenever the vendor had made an unimportant error in describing the property.

[1] July 1885, at p. 299.

The essentiality of a misdescription is not determined in the abstract, but the Court has regard to the purchaser's desire at the date of the contract, e. g. his intention to use the land in a particular way and to his position, e. g. as the owner of adjacent land. Thus, in one case[1], the Court took into consideration the fact that the purchaser was a timber-merchant and had bought the estate for the sake of the timber trees. The cases illustrating what are and what are not 'essential' misdescriptions are very numerous; but without entering into much detail they may be classified as misdescriptions affecting (1) the identity of the property; (2) the tenure, quantum of vendor's estate or nature of vendor's interest; (3) the size; (4) the situation and physical conditions; (5) the incumbrances, contingencies and liabilities affecting the property; (6) the rent or profits produced by it.

(1) Misdescriptions affecting the identity of the property are essential; thus, where a house numbered 2 was described as 'No. 4,' the contract was rescinded, although No. 2 was the same sort of house as No. 4, and in better repair. (2) Misdescriptions affecting the tenure, &c. Such misdescriptions are, as a rule, essential; e. g. describing leasehold or copyhold as 'freehold,' or an underlease as a 'lease,' or a reversion or a life estate as 'fee simple;' but describing freehold as 'copyhold,' is probably non-essential[2], and a slight error in the length of the term in describing leasehold property, e. g. a 97 years' lease described as 99 years, is not essential. (3) Misdescriptions affecting the size of the property will be treated as essential if the deficiency is large in proportion to the whole acreage, or if the part which is wanting is necessary to the enjoyment of the residue, or possesses some special value in the purchaser's eyes, or would, if possessed by another, be liable to affect the purchaser's enjoyment of the residue. (4) Misdescriptions affecting the situation, &c. of the property. In some of the earlier cases misdescriptions as to the situation of the property were treated as non-essential which would now be regarded as essential; thus, where an estate in Kent was described as being situate in Essex, the contract was enforced, although the purchaser declared that his object in purchasing was to become a freeholder of Essex[3]. Such misdescriptions seem, in fact, hardly distinguishable from misdescriptions as to identity; see No. (1).

[1] *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298.

[2] See *Twining* v. *Morrice*, 2 Bro. C. C. 326; secus, *Ayles* v. *Cox*, 16 Beav. 23, where however Lord Romilly's statement, 'it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another,' seems incorrect, as the cases show that unless the error is obviously essential the purchaser must explain why it is essential to him.

[3] *Shirley* v. *Davis* cited with disapproval in *Drewe* v. *Hauson*, 6 Ves. 678.

Misdescription as to the state of repair is not essential except in the case of a house wanted by the purchaser for immediate occupation. Ornamental timber is an essential matter in the purchase of a residential estate; ordinary timber is non-essential, unless the purchaser is a timber-merchant buying for the express purpose of cutting the timber. The absence of houses, water supply, or frontage, described as belonging to the property, is essential. (5) Incumbrances, &c. The absence of title to tithes where an estate is sold tithe-free is usually essential; but the existence of small rent-charges not mentioned by the vendor is not essential. Rights of mining and common, restrictive covenants, rights of sporting, and, in the case of land sold as building land, rights of way are essential defects. (6) Misdescriptions affecting the rent or profits would seem to be non-essential. Lastly, where the misdescription or defect in title affects not the whole estate but only a portion, the essentiality of the misdescription or defect depends on two questions: first, Is the defect an essential one as regards that portion? secondly, If so, is that portion essential as regards the whole property?

The phrase occurring in rules 2 and 3, 'if compensation can be fairly assessed,' requires some explanation. In rule 2 the words are put in brackets as practically unnecessary, because if a misdescription is non-essential it is from the nature of the case capable of pecuniary compensation. In rule 3 the words are inserted with some doubt, because the Courts have assessed compensation in some cases where it would seem that no pecuniary compensation could be fairly given; thus the absence of any title to work the minerals has been the subject of compensation (see below). It must be observed that the proviso is not 'if compensation can be assessed,' but 'if compensation can be fairly assessed.' It is, of course, always possible to assess compensation, just as it is always possible to measure damages for injuries to the body, the feelings, or the reputation. But in assessing damages for a tort it is not considered necessary nicely to weigh the damage in the interest of the aggressor, justice being satisfied if the damages given to the person injured are sufficient, and not caring if they may happen to be too much. In computing compensation for a misdescription however, the rough calculations of a jury are unsuitable: the interests of the vendor have to be considered as well as those of the purchaser, and if the compensation does not admit of a pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, the Court will probably refuse to make a rough estimate or an educated guess. The mere difficulty of assessment, where a fair assessment is possible, will not, however, deter the Court. In one or two cases, where the possibility of assessment was doubtful, the Court directed an enquiry whether

compensation could be assessed. Sometimes the surrounding circumstances offer a clue to the amount of compensation due to the purchaser. In one case, the sale of a colliery [1], where the annual profits had been overstated, the purchase-money was taken as the basis for calculating the capitalized value of the deficiency in the profits, because the purchaser had, by offering such sum, shown how he himself capitalized the annual profits as stated by the vendors. So, too, upon the sale of tithes [2], which the vendor had omitted to describe as subject to an annual fee-farm rent, the Court assessed the compensation at 29 years' purchase of the fee-farm rent, because this was the number of years at which the purchaser had himself capitalized the tithes; and similarly, in an action [3] to rescind the sale of a contingent reversion, on the ground of the inadequacy of the price, the fact that the purchaser had offered one sum under the belief that the reversion was absolute, and on hearing that it was contingent had reduced his offer by one half, enabled the Court to fix the value of the contingent reversion as half the value which such reversion would have borne if it had been absolute.

A deficiency in the vendor's interest, which depends for its extent on the duration of a life, admits of actuarial computation and will therefore be assessed by the Court. Nor does the chance that the duration of the life may be so different from the actuary's estimate as to give the purchaser both the estate and the compensation make this method of assessment unfair; because the purchaser is equally exposed to the chance of the compensation being, in the event, too small, and the Court will 'throw the chances together [4].' In this way compensation has been given where the vendor had only a life estate instead of the fee, or had only a remainder expectant on the determination of a life estate, or had only an estate *pur autre vie*; similarly too, upon a contract to grant a lease for years, where the lessor turned out to have only a life estate.

Where the thing to be compensated for is the absence of title to the minerals, the question 'Can compensation be fairly assessed?' is more difficult to answer. The authorities are conflicting. Compensation was assessed in *Seaman* v. *Vawdrey*, 16 Ves. 390 (which however was a suit by the vendor for specific performance), *Ramsden* v. *Hirst*, 4 Jur. n. s. 200, and *English* v. *Murray*, 49 L. T. 35 (where purchaser wished to rescind, the vendor pressing for specific performance with an abatement); but was considered not to admit of calculation in *Smithson* v. *Powell*, 20 L. T. 105, and *Re Bunbury's estate*, 1 Ir. R. Eq. 458. The method of assessment followed in *Ramsden* v.

[1] *Powell* v. *Elliot*, L. R. 10 Ch. 424.
[2] *Baker* v. *Brent*, 1 Russ. & M. 424.
[3] *Hornblow* v. *Shirley*, 13 Ves. 84.
[4] Lord Eldon in *Milligan* v. *Cooke*, 16 Ves. 1.

Hirst[1], viz. to deduct from the purchase-money the value of the minerals to be ascertained by an expert appointed by the judge, seems to be unfair to the vendor, as introducing too much uncertainty, since it was not even known whether there were any minerals at all. A fairer method, at all events in an agricultural neighbourhood, would be to estimate the value of the land as agricultural land, and if necessary reduce the purchase-money to such estimated value. In the case of a house in a residential neighbourhood, it seems impossible to say how much less the property is worth on account of the absence of title to the minerals, since the enjoyment of the property being unimpaired by the defect, the difference in value could only arise from the diminished saleableness of the house, which is too uncertain to admit of computation.

Upon the whole it seems the better opinion that where compensation cannot fairly be assessed the Court will not grant compensation. But some of the cases undoubtedly go far to show that a way out of the difficulty can always be found; see (in addition to the cases referred to above, of compensation for the absence of title to minerals) the case of *Peacock* v. *Penson*, 11 Beav. 355, where compensation was assessed[2] for the damage sustained by the purchaser, in consequence of the vendor's inability to construct a road which by the conditions of sale he had undertaken to make.

The proviso in rule 3 as to the misdescription being contained in the written contract is inserted on account of the law relating to parol variations of written contracts. A purchaser asking for partial performance with compensation for a parol misdescription will not be aided by the Courts, because this would be enforcing a contract, one of the terms of which has not been reduced to writing. It would perhaps be unnecessary to make this insertion if reliance could be placed on the definition which is sometimes[3] given of 'misdescription,' distinguishing it as something which necessarily occurs in the written contract, the word 'misrepresentation' being reserved for misstatements made *dehors* the contract. But this is an arbitrary distinction, as a description may be made by parol and a representation may be contained in the

[1] See the report of that case in 4 Jur. n. s. 200; the decree, however, merely declares that the purchaser 'is entitled to compensation out of his purchase-money' (it was a sale by the Court) 'in respect both of an outstanding right under the agreement of 22 Nov. 1823, to enter the land and sink shafts and work the mines, and also of the purchaser being precluded from working the coal (if any) under the said land himself,' 1857 B. 1259. A subsequent order shows that £195 was paid to the purchaser for compensation, the amount of the purchase-money being £2241; 1857 B. 1354. I have been unable to find the decree in *Seaman* v. *Vawdrey* either in the index or in the Records themselves.

[2] However, the decree itself contains no order or direction as to compensation. 1848 B. 257.

[3] Cf. *Behn* v. *Burgess*, 3 B. & S. 751.

written contract. The distinction really aimed at in *Behn* v. *Burgess*, is that made above between essential and non-essential misdescriptions.

The words in brackets at the end of rule 3 are open to serious doubt; probably on the whole they should be omitted. In *Balmanno* v. *Lumley*[1] Lord Eldon expresses the opinion that the Court can neither force the purchaser to accept nor the vendor to give an indemnity. It is probably correct to say that a purchaser cannot be forced to accept an indemnity, on the broad ground that the purchaser is entitled to rescind if the misdescription is essential, and no indemnity will be necessary if the misdescription is non-essential, and therefore capable of pecuniary valuation; though in *Wood* v. *Bernal*, 19 Ves. 220, Lord Eldon himself thought the purchaser might be compelled to take an indemnity for a small incumbrance upon a considerable estate. But a vendor has in many instances been held bound to give an indemnity. This has been effected either by the vendor's executing a security or by his paying into Court a sufficient portion of the purchase-money to abide the event. In *Milligan* v. *Cooke*, 16 Ves. 1, the Court ordered an enquiry, what was the difference in value of the interest proposed for sale and the interest the vendor had, and if the Master should find that he was unable to ascertain such difference in value, 'the Master should settle such security by way of indemnity as it should appear just that the vendor should execute.' In *Wilson* v. *Williams*, 3 Jur. n. s. 810, where the vendor had omitted to state that his wife would be dowable out of the property and she refused to concur, it was directed that so much of the purchase-money should be retained in Court, the annual interest whereon would equal the annual profits receivable by the wife as her dower, the vendor to receive the interest during the joint lives of himself and his wife, the interest to be paid to her during her life if she survived him, and the principal upon her decease to go to the vendor. But it may be doubted whether compensation could not have been assessed in that case; an actuary could have calculated the chance of the wife having dower and the probable duration of such dower. And to compel a vendor to pay money into Court to abide the event for the purpose of protecting the purchaser against a contingency, might be an even greater hardship to him than to order him to pay a lesser sum out and out by way of compensation.

Secondly, where there has been a condition or stipulation in reference to compensation.

The condition may be either that compensation shall or that it shall not be allowed.

[1] 1 Ves. & B. 224 followed in *Aylett* v. *Ashton*, 1 My. & Cr. 105.

A condition allowing compensation seems to have no effect on the mutual rights of vendor and purchaser, except in the three cases mentioned below. The rules given above (p. 54), as to the granting of compensation in the absence of any previous agreement, will therefore be applicable even where there is an agreement that compensation shall be given; e.g. the Court will rescind the contract, notwithstanding the condition, if there has been an essential misdescription and the purchaser wishes to have the contract rescinded.

The three exceptions above referred to are the following:—

(1) A condition allowing compensation to the purchaser will be enforced even where the error has not been discovered until after completion, unless the condition is expressly limited to errors discovered before completion. This, notwithstanding some conflicting decisions, may be taken as having been settled by the cases of *Bos* v. *Helsham*, L. R. 2 Ex. 72, *Re Turner and Skelton*, 13 Ch. D. 130, and *Palmer* v. *Johnson*, 12 Q. B. D. 32, 13 Q. B. D. 351. The condition, however, does not apply, after completion, in the case of a defect in the title, where the vendor has not made any misstatement. Thus in *Exp. Riches*, 27 Sol. J. 313, where the vendor had only a life estate in part of the property, but sold as absolute owner, the Court of Appeal held that a condition for compensation in case any 'error, misstatement or omission' should occur did not apply, as this was a mere defect in title. And where the condition for compensation is only in respect of any 'deficiency in the quantity or acreage,' the purchaser would probably not be able after completion to obtain compensation for any other error, e.g. a misstatement of the rental. If the condition embraces in terms only 'errors and misstatements,' or 'misdescriptions,' a question might arise whether a mere omission would be within the condition. The actual decision in *Manson* v. *Thacker*, 7 Ch. D. 620, might perhaps be upheld on the ground that the non-mention of the hidden culvert was an 'omission,' and not an 'error' or 'misstatement,' and that the condition did not expressly include 'omissions.'

(2) Where there is the usual condition for rescission, the right of the vendor to enforce that condition may be affected by the fact that the contract contains a condition for compensation. In the absence of any condition as to compensation the purchaser's demand for compensation would, like any other requisition, enable the vendor to rescind under the condition for rescission. If there is a condition for compensation, and an error covered by that condition is admitted or clearly proved by the purchaser, the vendor will have to give compensation, and cannot rescind on the ground of unwillingness to comply with the purchaser's requisition.

(3) The third exception to the general rule is one which in the opinion of the writer has no good foundation, but it is inserted here in deference to the authorities mentioned below. It is this, that where the defect is known to the purchaser at the date of the contract, or is one which the purchaser is by the conditions precluded from objecting to, the condition for compensation will nevertheless enable him to obtain compensation. The authorities for this very disputable proposition are the opinions of Mr. Justice Kay in *Lett* v. *Randall*, 49 L. T. 71, and of Vice-Chancellor Bacon in *English* v. *Murray*, 49 L. T. 35. In the former case the vendors had described the property as let on lease for 75 years from 1850, the fact being that the term commenced in 1858. Mr. Justice Kay thought that the purchaser did not actually know the description was wrong, but that even if he did, the vendors were bound to give compensation because they had contracted to give it. The argument that the purchaser had paid a higher price owing to the misdescription, because even if the purchaser knew of the mistake the other bidders did not, and being influenced by the description bid higher than they would otherwise have done, does not seem conclusive. Either the purchaser was content to give the price he offered, in which case he wanted no compensation, because he had suffered no damage; or he paid more in the expectation of obtaining compensation, in which case he committed a fraud on the vendors. In the case of *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754 (see p. 762), the late Master of the Rolls held that a purchaser who had notice that property described as a lease was only an underlease, was not entitled to compensation under a condition allowing compensation 'if any error or mistake shall appear in the description, or in the nature or quality of the vendors' interest therein.' And though the word 'lease' was only ambiguous and therefore no actual misdescription had occurred, the principle of the case is certainly at variance with the opinion of Mr. Justice Kay in *Lett* v. *Randall*. The second part of the proposition above set out is even more doubtful, but is founded on *English* v. *Murray*, where a condition which was held to be sufficient to preclude the purchasers from rescinding on the ground of a defect in the vendors' title, was in the Vice-Chancellor's opinion not sufficient to preclude them from demanding compensation under the condition for compensation. But it is to be observed that the vendors there, both before the action and at the hearing, conceded the purchasers' right to compensation, the only point for the Vice-Chancellor's decision being whether the purchasers were entitled to rescind.

The condition that no compensation shall be allowed to the

purchaser, though sufficient to prevent a purchaser from insisting on completion with an abatement of the purchase-money, is not sufficient to enable the vendor to enforce specific performance where there has been an essential misdescription. It has been said (by Malins V.C. in *Whittemore* v. *Whittemore*, 8 Eq. 603), 'conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements.' But it is not, properly speaking, a question of construction; it is rather a principle of equity that, notwithstanding the conditions of sale or the agreement, the vendor shall not have specific performance if he have materially misled the purchaser (*Re Terry & White*, 32 Ch. D. 14; see judgments of Lord Esher M.R. and Cotton L.J.). And not only is specific performance refused to the vendor in such cases, but the purchaser can obtain a decree for rescission of the contract.

WILLIAM WEBSTER.

STOIC TERMINOLOGY IN ROMAN LAW.

IT is a commonplace to assert that the Roman jurists were followers of the Stoic philosophy, though few would maintain that the Roman jurists embraced the views of Zeno in their completeness. From its first introduction into Rome Stoicism was becoming eclectic. Panætius (reckoned the founder of Roman Stoicism), B.C. 180–110, was suspected of loving the Academy better than the Porch; and the more direct testimony of Galen shows that, nearly fifty years before Ulpian, Stoicism of the old type was extinct as a theory. It never could have been practically dominant at Rome owing to the direct opposition between its precepts and those traditions of public life, and public duty of an active sort, which prevailed among the leading families down to the triumph of the military party under Severus[1]. Still the effects of Stoicism on the form and terminology of the law were by no means slight. It is scarcely possible for a symmetrical and highly finished system to be brought into close contact with a body of rules inferior in such qualities, without greatly affecting its form and minor details if not its substance and main structure, of which truth a subsequent example may be found in the mode in which feudalism was made to lisp the language of the Civilians[2].

This influence of the Stoics is best seen among the Proculeians, the two characteristics of whose school, viz. (1) comparative liberality in admitting new principles, and (2) the rigidity with which it carried out those principles to their legitimate consequences, are thus explained[3], owing to the Stoical fervour of Antistius Labeo. And as the Stoics were both much addicted to etymology and great word-worshippers[4], whilst from the rigidity

[1] The Stoic philosophy was from the first cosmopolitan, but the Roman lawyers continued national in thought and feeling at least down to the age of the Antonines. The doctrine 'Ubi Imperator, ibi Roma,' is late, and with its establishment interest in public life declined, just as it had done in Greece after Aristotle, and the subordination of Ethics to Politics ceased.

[2] Another example may be found in Bracton's adaptations of the language and form of Justinian and Azo; see Scrutton, 'Roman Law and the Law of England,' p. 82.

[3] But this systematic deduction of consequences from a set of imperfect principles (even though those principles may be in themselves a great improvement on the more primitive notions) will often produce a worse result than that obtained by covertly modifying the ancient rules by 'interpretation' or by openly supplementing them by direct or judicial legislation. The respective performances of Lord Eldon and Lord Mansfield furnish an example.

[4] The Stoics naturally attached much importance to everything connected with the origin and primary signification of words, as they held (in opposition to the Peripatetics) that there was a natural adaptation or special fitness of each name to the thing named.

of their logic they were specially termed 'Dialectici,' we may expect to find these characteristics also amongst his followers.

For example, in the great question of 'Specificatio' or 'New Forms' the Proculeians, following the Stoics, regarded Form as comprising all those essential attributes by means of which a thing is made to be what it is, or (in other words) by means of which a definite character is impressed on matter otherwise indeterminate. Now if this 'matter' be regarded as uniform throughout nature, it is manifest that the imposer of the form is virtually the creator of the thing, and the Proculeians accordingly were perfectly consistent in maintaining that the wine or the vase made by one man from the grapes or the metal belonging to another belonged to the maker and not to the owner of the original materials.

Again, the doctrine of the Proculeians that maturity should be fixed, not by reference to physical facts but by reference to periods of seven years, is manifestly Stoical, that sect having divided human life into periods of seven years, of which the first three were terminated by (1) Second Teeth; (2) Youth; (3) Beard.

We have the positive testimony of Aulus Gellius (x. 13) that Labeo was a zealous investigator and enforcer of the proprieties of language, though it must be owned that in the department of etymology (of which, Stoic-like, he was a diligent student) he had less success than his strenuous exertions deserved. Some of his etymological crotchets had serious consequences. Deriving 'possessio' from 'pedis' or 'sedis' positio, he thence inferred that two persons could no more possess the same thing than they could occupy the same place.

A still more weighty inference was founded on the supposed derivation of 'furtum' a 'ferendo seu auferendo[1],' which led rigorously to the principle that no immoveable could be stolen; and as this was confirmed by Justinian, the jingle of words was accepted as a dictate of natural reason: and our English judges,

Οἴεται Ἀριστοτέλης, θέσει εἶναι τὰ ὀνόματα—νομίζουσιν οἱ ἀπὸ τῆς Στοᾶς φύσει (Origen contra Cels. i. 24).

[1] Among other specimens of derivations after the fashion of the Stoics may be mentioned—

Testamentum	from	Testatio mentis.
Argumentum	,,	Quod arguat mentem.
Monumentum	,,	Quod moneat mentem.
Mutuum	,,	Quod de meo tuum fit.
Reddere	,,	Rem pro re dare.
Pratum	,,	Paratum ad fructum capiendum.

Pomponius derives oppidum 'ab ope,' following Cicero, who in his last work 'De Gloria' (of which this fragment has been preserved by Festus) says, 'Oppidum, ut imiter ineptias Stoicorum, quod opem daret.' But this expression really shows that Cicero had not much faith in the method. Labeo's derivation of 'soror' from 'seorsum' because the young girl is separated from her family to follow her husband, appears to us simply a bad pun, but such displays of ingenuity did not go out of fashion till the end of the seventeenth century.

going somewhat beyond Labeo, declared that title-deeds could not be stolen as they 'savoured of the realty.'

The Proculeians also showed a true Stoical love of subtle logic when they asserted that Exchange could not be considered as a Sale, and that the master of a fugitive slave could not acquire through the slave so long as he continued fugitive, for as the master could not hold the slave himself much less could he hold anything by means of the slave; a subtlety deservedly rejected by later writers, who on this point adhere to the Sabinian school.

The peculiar views of the Stoics in the domain of physics have also left traces on the Roman law. Mere physical continuity as a criterion of unity appears always to have exercised great influence over the minds of the ancients, and in the case of such strict materialists as were the Stoics such an influence would be peculiarly strong. It is easy, for example, to show from the Pandects that a wide distinction was drawn between particles of matter so disposed and united that they cannot be separated without the so-called 'destruction' of the object, and particles of matter made so coherent artificially that although they have once been separate they now act and are considered as a single 'mass,' whilst both these conditions were broadly distinguished from those particles of matter, or collections of particles which are united merely by a collective name, or as some would say by a concept. This is thoroughly Stoical, and is very clearly given by Paulus (Dig. vi. 1. 23. § 5), where, discussing the question as to what things can be sued for by the 'vindicatio,' he attaches much importance to the difference between 'ferruminatio' or 'welding' and 'plumbatura' or 'soldering,' as the one produces complete 'confusio,' whilst the other merely effects a junction; and makes the difference between both these states, and those aggregates which are composed of individuals obviously separated from each other, quite decisive.

Paulus concludes by a distinction and reason: 'Quod non idem in cohærentibus corporibus eveniret: nam si statuæ meæ brachium alienæ statuæ addideris, non posse dici brachium tuum esse; quia tota statua *uno spiritu* continetur.' This employment of the expression 'uno spiritu' is unintelligible if not strictly Stoical[1], and is further illustrated by Pomponius (Dig. xli. 3. 30) in discussing the

[1] Seneca (Epist. 102) remarks, 'Nullum bonum putamus esse quod ex distantibus constat, uno enim spiritu unum bonum contineri et regi debet.' And again (Epist. 117), 'Placet nostris quod bonum est esse corpus, quia quod bonum est facit: quidquid facit corpus est.' We have here the Stoical doctrine that nothing which is not material can either act or be acted upon: and the Roman lawyers, taking like the Stoics a completely practical view of philosophy, readily entered into such sentiments. The object of both was to discover a firm basis for human actions, and practical men seldom soar above the obvious.

question whether materials having been once united and afterwards disunited, the time during which they were united was to be allowed to count for the purpose of usucapio. The passage is indeed a very elegant synopsis of Stoical principles on the question [1]. 'Tria autem genera sunt corporum: Unum quod continetur *uno spiritu*; et Græce *ἡνωμένον*, id est unitum vocatur; ut Homo, Tignum, Lapis, et similia; Alterum quod ex *contingentibus* hoc est pluribus inter se cohærentibus constat quod *συνημμένον* (id est connexum) vocatur; ut Ædificium, Navis, Armarium. Tertium quod ex distantibus constat, ut corpora plura non soluta sed uni nomini subjecta; veluti Populus, Legio, Grex [2].'

As for those passages which stand at the commencement of Digest and Institutes alike, at once the commonplace and the jest of every tiro, their connexion with Stoicism is so readily admitted that it would be a waste of time to prove it, and I will therefore merely remark that Ulpian's definition of jurisprudence is an almost literal translation as to its former part of the definition of *σοφία* attributed by Plutarch to the Stoics [3] and of which Chrysippus has the credit, and in its latter part may be said to paraphrase the Stoical definition of *φρόνησις* [4], confusing thereby the limits of speculative and of practical wisdom, and making jurisprudence conterminous with philosophy. This is the more strange on the part of Ulpian, as the popularity of Cicero must have made his definition of 'sapientia' (De Off. i. 153 [5]) familiar to every educated Roman, and Ulpian therefore could not have intended to conceal his identification of the one with at least a portion of the other; and this argument is strengthened by the close analogy between the function attributed to 'jurisprudentia' and Cicero's 'prudentia cernitur in delectu bonorum et malorum [6].' But it would be most unjust to charge the Roman jurists with simply adapting passages and adopting definitions without acknowledgment. In Dig. i. 3. 2

[1] I incline to think it is a paraphrase of the passage from Conon Mathematicus quoted in the Isagoge ad Arati Phenomena (attributed to Achilles Tatius), xiv, the points of resemblance being too numerous to be accidental.

[2] Much of the importance of this passage is due to its crucial character. There is here no eclecticism, the expressions being unintelligible if employed in any sense but the Stoical. The two passages must be read in the light of the strange hypothesis of air currents best known to modern readers from Zeller's synopsis of Stoical doctrine: 'All attributes by which one object is distinguished from another are produced by the existence of certain air currents which emanate from the centre of an object, diffuse themselves to its outer limits, and having reached the surface return again to the centre to constitute the inward unity.'

[3] Plac. Pro. 2: *Οἱ μὲν οὖν Στωϊκοὶ ἔφασαν τὴν μὲν σοφίαν εἶναι θείων τε καὶ ἀνθρωπίνων ἐπιστήμην.*

[4] *Ἐπιστήμη ὧν ποιητέον καὶ οὐ ποιητέον καὶ οὐδετέρων.*

[5] 'Sapientia rerum est divinarum et humanarum scientia.'

[6] De Fin. v. 23. Cicero both here and in De Off. i. 43 ('Prudentia quam Græci *φρόνησιν* (vocant) est rerum expetendarum fugiendarumque scientia') appears to follow the Peripatetics. Aristotle would probably have placed jurisprudentia under *φρόνησις*. See Eth. Nic. vi. 8, with the commentaries of Grant, Magirus, and Golius.

Marcianus, after quoting a passage which he asserts to be due to Demosthenes, goes on to quote another from Chrysippus ('Philosophus summæ Stoicæ sapientiæ') consisting of a comment on the famous line of Pindar, *νόμος ὁ πάντων βασιλεύς*, which had already furnished a text for Herodotus and Plato, and of an adaptation of an Aristotelian maxim equally famous though less frequently perverted [1].

With the Stoics also, deus, natura, fatum, fortuna, were synonymous, and the confusion of ideas set forth in Ulpian's notorious 'Law of Nature' thus admits of easy explanation, being derived from a Greek conception originating in a rough observation of the order of nature, and a Roman conception springing from a certain known uniformity in the habits and customs of mankind.

WOLSELEY EMERTON.

[1] *Φύσει πολιτικὸν ζῷον (ἄνθρωπος).*

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

England's Case against Home Rule. By A. V. Dicey. London: John Murray. 1886. viii and 312 pp.

This book is no ordinary work of political controversy. It is an admirable example of the application of scientific methods of Constitutional law and of history to the burning question of the day. It is not the *ex parte* statement of an advocate, but is written with judicial impartiality, and at the same time with judicial decisiveness. It is hardly necessary to say that Professor Dicey's knowledge of history is not that of the man who rushes in the middle of a debate to find a volume of Hansard to fling at an opponent. He eschews wholly the historical recriminations, and the reckless resuscitation of bitter memories of the spirit that

> 'Visits ancient sins on modern times,
> And punishes the Pope for Cæsar's crimes.'

Professor Dicey views his subject as a business matter and treats it on business principles. He respects opponents. He does not impute evil motives to a single statesman past or present. He is free from the English fault of sneering at and despising things Irish, which, as he truly says, more than any defect in the Constitution, prevents the Union from becoming a reality. He has none of that self-righteousness which drives an opponent to madness by assuring him that he does not know what is good for himself, and that in opposing him it is actuated purely by disinterested motives.

Professor Dicey argues in a manner which is both more true and less irritating. Home Rule is not a matter which concerns Ireland alone, but the whole United Kingdom. It is *ex hypothesi* not a demand for national independence or separation. If such a demand were put forward it might no doubt fairly be supported by Irishmen, without any regard to its effects on Great Britain. But the Home Rule cry is not a demand for a dissolution of partnership, but merely for the grant of fresh terms of partnership. To such a demand the remaining partners cannot be expected to agree unless the change be for the good of the whole firm.

Professor Dicey therefore treats Home Rule as it affects England and the Empire at large. He analyses the causes of the astonishing growth of the Home Rule movement, and attributes that growth to tendencies much deeper than the personal influence of a single statesman.

He criticises the various arguments and the foreign examples which are set forward as supporting Home Rule. His masterly examination of the constitution and circumstances of Germany, Austria, and the United States, the three principal and favourite examples of Home Rulers, shows how little they bear out the views they are quoted to prove.

He next discusses the possible forms of Home Rule. So far as Home Rule proposals have hitherto taken any definite shape they have been either in the form of Federalism or of Colonial Independence, or of some combination, such as that of Mr. Gladstone's Bill, of the two. But a description of the necessary conditions of Federalism shows that any such proposal involves a Constitutional Revolution, and the complete destruction of our present system of

Parliamentary Government, while Ireland would not relish the checks and restraints of a Federal Government any more than those of the present system. In fact, as Professor Dicey sums up the matter,—'An attempt to impose on England and Scotland a constitution which they do not want and which is quite unsuited to the historical traditions and to the genius of Great Britain, offers to Ireland a constitution which Ireland is certain to dislike, which has none of the real or imaginary charms of independence, and ensures none of the solid benefits to be hoped from a genuine union with England.'

Again, arguments have often been based on the notion of putting Ireland into the position of one of the self-governing colonies. But the account which Professor Dicey gives of the relations between these colonies and Great Britain shows the vainness of such an idea. The position is too poor a one for Ireland to accept. Under the apparent self-government of the Colony lies hid absolute subjection to the mother-country. The relationship is only possible during the continuance of mutual sentiments which between England and Ireland do not exist. 'It is idle to fancy that a scheme based, like our scheme of Colonial Government, on friendly understandings, and the habitual practice of compromise can regulate the relations of two countries which are kept apart mainly because they cannot understand one another, and can neither of them admit the necessity of mutual concessions' (p. 214).

Upon the 'Gladstonian Constitution,' as Professor Dicey calls the Government Bill of last spring, he bestows the most impartial and searching criticism it has yet received. His conclusion is sufficiently clear:—'Home Rule under the Gladstonian Constitution means an artificial combination of Federalism and Colonialism. Its aim is to secure the advantages of two opposite systems; its result is to combine and intensify the disadvantages of both systems . . . To the ingenuity of the plan proposed by Mr. Gladstone's ministry hostile critics have given insufficient praise. But the essential unreality which this ingenuity has concealed has not even yet met with due condemnation. Since the day when the National Assembly of France presented the brand-new French Constitution for the acceptance of Louis XVI. no form of government has ever been seriously proposed for adoption by an intelligent people so radically unworkable as that Gladstonian Constitution which has been instinctively rejected by the good sense of the British Parliament' (pp. 276–7).

Professor Dicey's conclusion accordingly is that Home Rule involves all, and more than all, the evils of separation. Between separation and the maintenance of the Union, therefore, there lies no alternative. Separation is not asked, and if it were asked would be forbidden by every consideration both of honour and of policy. No choice, therefore, remains except—hard as the effort may be—to maintain and make cordial the Union.

This sketch of the main argument of the book will show its importance. The admirable manner in which each point is worked out must be studied in Mr. Dicey's own pages. The book is no less marked by its firm grasp of principle than by the practical intimacy which it displays with the whole course of the debate; by its temperance of tone than by the effectiveness of its incidental retorts. It is characterized, moreover, by a fulness and suggestiveness of remark which often reminds the reader of the political writings of Edmund Burke. For all of these we must refer to the work itself.

The book is marked by a few blemishes due to haste, such as the numerous printer's errors and the statement (p. 72) that the rebellion of 1798 took place eighteen years after the independence of the Irish Parliament.

In pointing out the extent to which provisions that incur the odium of coercion in Ireland form the ordinary law of other parts of the kingdom, Professor Dicey hardly knows the strength of his own case. The facts have been stated for Scotland in the most pointed way by Sir George Trevelyan, the late Scottish Secretary. Speaking of the provisions which were found most effective in the Crimes Act of 1882, he said:—

'Government resolved to have a preliminary investigation on oath into undetected crime,—which you have in Scotland. They resolved to have power of changing the scene of a trial from a locality where public feeling was too strong for that trial to be a fair one,—a power which you have in Scotland. They resolved to call a special jury in cases of crime,—as a substitute for the far more potent and effective system of convicting or acquitting by a majority of jurors, which you have in Scotland. They resolved to allow a summary sentence of a few months to be inflicted for crimes of violence and intimidation by two stipendiary magistrates,—who answer in essential respects to your Scotch sheriffs.'—(Speech at Galashiels, 7th May, 1886.)

Again, Professor Dicey, while doing full justice to the motives and character of the authors of the Union, accuses them of 'the intellectual blunder of supposing that a change or improvement in the form of the constitution would remove evils due to social and economic causes.' Neither Pitt nor Cornwallis are liable to this charge. In the words of Cornwallis in his despatch to the Duke of Portland, 'The evils proposed to be cured by the Union are religious divisions, the defective nature of the imperial connexion, and commercial inequalities.' The Union was necessary to prevent Protestants from exterminating Catholics and to save the empire from foreign invasion. These were the motives of its authors, and these two vital ends it secured so thoroughly that it is forgotten how urgent was the danger. As to the other social and economic evils of Ireland, it must be remembered that in the minds of Pitt and Cornwallis the Union was but the beginning of a series of reforms which, as it proved, even they had not the power to carry through.

Such matters as these, however, are but microscopical blemishes upon a book which is to be admired as an example of scientific method and to be welcomed as an invaluable contribution to a discussion in which the future of our country is at stake.

J. Parker Smith.

Traité théorique et pratique de Droit Public et Administratif. Par A. Batbie. 2ième Édition. Paris: Larose et Forcel. 1885–1886. 8 vols.

French public administration has nothing picturesque about it, no quaint superstructures, no musty foundations sapped with green mould, no odd groupings of antiquated institutions re-dressed, no traces of the hand of remote builders of successive ages. To the sociologist it is as an architectural drawing to the art-critic, with its ruled perspective and divisions sketched out with square and compasses. All is large and commodious however in the brand-new and well-kept structure. M. Batbie does not seem to regret the uniformity, though he appears to envy the Anglo-Saxon race that confidence in each other the absence of which has obliged Frenchmen to surround the administration of their country with safeguards, to the detriment of local development, self-government, and self-help.

Centralisation, monotonous and frigid as it is, has its good sides. 'Cen-

tralisation,' says M. Batbie, 'has rendered eminent service to civilisation; it has created higher life at the centre by developing intelligence and accumulating activity there. This force has thence been driven by central propulsion to the extremities, and thus all parts of the country have been associated in the life of the centre; they have been drawn into the movement of civilisation, whereas under a system of decentralisation the inhabitants of some regions would have developed locally and vegetated on the spot. Individuals have acted less for themselves, but they have received from the centre a portion of a stronger life than they would have had at the extremities by their own development. Thanks to this everywhere uniform organisation, the public service is at the same degree of advancement and perfection in the south as in the north. Decentralisation would have entailed inequalities to the detriment of civilisation in a great part of the country. Provincial varieties might, no doubt, have been allowed to subsist, and reform might have been confined to bringing them more and more under central influence. The advantages of centralisation and decentralisation, of concentrated force and force diffused to the extremities, might thus have been combined.' M. Batbie recommends his countrymen, however, not to waste time in futile regret. France is condemned to centralisation by her history, and all she can now do is 'to make the best she can of what she has and not throw away her activity in efforts to revive what is dead' (vol. i. p. 209).

It would nevertheless not appear that M. Batbie is opposed to further reform in the direction of decentralisation. His adverse criticism is directed, as we gather from his generalisations elsewhere (vol. iv, ch. 32), more especially against the proposals which had many supporters in their time of MM. Béchard and Raudot. These persevering radicals in decentralisation proposed to revive the old provinces as groups of departments, and by restoring the old provincial capitals with a concentrated local administration to retain local administrative talent for local consumption. Their proposals, if carried out, would have amounted to a revolution from top to bottom in existing French institutions. The events of 1851 supervened when the question was maturing in parliament. During the Empire no progress was made, though the advocates of decentralisation kept up their agitation, and it was only in 1871 that politicians, after a terrible foreign and a still more terrible civil war, came to look upon decentralisation as a practical means of determining a flow of the congested political energies of the capital to the provincial centres.

The Act of the 10th of August, 1871, on the Department Boards, and a series of Acts, including a Codification Act in 1884, relating to communal (parish) administration, curtailing the powers of the prefect, and instituting a certain measure of local autonomy, are the work of the Republic in decentralisation; and at the present day there is more provincial independence than is often supposed in England to exist among our neighbours.

M. Batbie's voluminous work is devoted to the description of the administration of France in all its details.

He divides it under the classification dear to jurists nourished in the notions of Roman law into persons, things, and modes of acquisition. M. Batbie observes that he is herein only applying to administrative law a division which has already been adopted in French civil law, and that it is so fundamental, so rational, that it is impossible to find a better (vol. ii. pp. vii–viii). He, however, somewhat stretches the sense of the term 'administrative' when he speaks of so classing administrative laws, for to suit his classification he is obliged to form into one whole a portion of the

public, the constitutional, the administrative, and the semi-administrative laws of France. In his second volume (the first is confined to a philosophical introduction on the relations between State and subject and the form and development of the State) he deals with civil equality, the rights of personal freedom and private property, freedom of the press and public meeting, and of religion and education, the right of taxation, the responsibility of government agents, and the separation of powers. The third volume comprises constitutional law, though, as we have seen, some portion of constitutional law has already been dealt with in the second volume, and, as distinguished from it, the laws relating to the public administration and the local administration of the departments and arrondissements. The fourth volume continues this subject with the administration of the communes and the armed forces. The fifth deals with public corporations as such—administrative, religious, charitable, scholastic, &c. In this volume the author passes to things, that is to say, public property, roads, railways, and tramways as affected by State interference, water-courses, forests, mines, the rights of the State as regards unhealthy or dangerous industries, and patents for invention as liable to become public property, &c. In vol. vi. the treatment of modes of acquisition begins. Under this heading the author treats of the different State taxes, State monopolies and local taxation. Vol. vii. brings this division to a conclusion with expropriation for public purposes, public works, public debts, actions to which the administration is a party, the different jurisdictions, and lastly the public accounts.

The divisions of M. Batbie enable him to comprise in his work all that relates to the government and administration of the nation, and they certainly afford more variety of treatment than the abrupt and hard lines of the usual classification based on the mere hierarchy of the administration.

The eighth volume is devoted to an alphabetical summary, with references to the preceding volumes. This is hardly an improvement, as it is meant to be, on an index. French authors have an aversion to indexes incomprehensible to the Anglo-Saxon reader, who looks upon a full and minute alphabetical table as essential to the utility of a work of reference. In the case of the book before us the value of an admirable work, in spite of the excellence of the alphabetical summary, is somewhat impaired by the want.

M. Batbie, on the other hand, much enhances the value of his work by careful descriptions of the corresponding institutions of other countries, and especially of Belgium, where self-government has made greater progress than in France, and England.

It would be a mistake to suppose that we have nothing to learn from France on the subject of local administration. Reform in our local institutions is a question of the day, and this reform, like all our recent reforms on the same subject, will probably have a tendency to the centralisation from which the French are retracing their steps. But there is a difference between the French and the English peoples in this respect. We have well-nigh completed our education in liberty, and do not require to teach our citizens to take a public-spirited interest in the administration of the country, to create, as M. Waddington in his report on the bill of 1871 said, 'a nursery of administrators.' We require good management without reference to any such lateral desiderata, and the study of French local institutions, which are simple and homogeneous, and have been worked out with the necessity of keeping the local bodies under control constantly in view, will not be without advantage to those who are arming themselves for the discussion of reform and local administration of this country.

THOMAS BARCLAY.

A Historical Introduction to the Private Law of Rome. By James Muirhead. Edinburgh: Adam and Charles Black. 1886. 8vo. xxiv and 462 pp.

The 'plan and execution' of this book are explained by Professor Muirhead in a prefatory note which tells us that it was originally written for the Encyclopædia Britannica, but had to be very much abridged in order to bring it within the limits of space which the Editor could afford to devote to its subject. Had it been otherwise, he suggests that he might have thrown it into a different form. The apology, however, is hardly necessary. It is true that we have here only a sketch of the external and internal history of the private law of Rome: but a sketch extending over nearly half a thousand pages admits of a good deal of detailed work, and on the whole the topics which the author has been led by judgment or by predilection to bring into relief and treat at greater length are just those upon which the student of Roman law and legal history most desires light and criticism. Every page of the book is written with reference to the latest continental contributions to the subject, and upon many disputed matters English readers are for the first time introduced to the views of writers more recent than Savigny and Sir Henry Maine, and to the results of a mass of monographical literature not otherwise easily accessible. How unsure is much of the ground, how countless the volumes of French, Italian and German, and how diverse the views of their authors, is known to not a few even in this country: and Professor Muirhead deserves congratulation upon the unusual judgment with which he chooses the good and rejects the bad from works so learned and yet in parts so fanciful as those (e.g.) of Voigt, of Kuntze, and (in a less degree) of Ihering.

The book is divided into five periods: that of the Kings; that of the *Jus civile*; that of the *Jus gentium* and *Jus honorarium* (latter half of the Republic); that of the *Jus naturale* and maturity of the Roman jurisprudence; and finally the period of Codification, extending from Diocletian to Justinian. Under each in succession we have an account both of the influences and the agencies by which the law was developed, and of its growth in its various branches—the Family, Property, Inheritance, Contract, and so forth. It would be tedious and out of place to summarise the whole of its contents, but as an example of the author's method it may be well to show those of the four chapters which deal with the period extending from the fall of the Republic to the reign of Diocletian, and marked by the activity of the brilliant lawyers to whom the Roman jurisprudence owes its fame and its perfection.

The first chapter, which treats of the characteristics and formative agencies of the law during the period, expounds the notion and fundamental principles of the *Jus naturale*, and describes the effects of the constitutional changes which ensued upon the substitution of monarchy for Republic, the consolidation of the Perpetual Edict by Salvius Julianus, the origin and significance of the *Jus respondendi*, and the nature of the imperial legislation in its various forms under the earlier Empire. Chapter ii. is devoted to a fuller consideration of the great lawyers of the time; their sects or schools, their work, and the extant remains of it which are not incorporated in the Digest of Justinian, such as the Institutes of Gaius, the Sentences of Paulus, and the Rules of Ulpian. From this we proceed to the substantive changes which the law underwent during the period: in particular, those connected with the famous Edict of Caracalla and the legislation of Augustus and Tiberius on the subject of manumission; the growth of the

peculiar privileges of the military class; the decay of the ancient family despotism exercised through *manus*, *mancipium*, *patria potestas*, and the *perpetua mulierum tutela*; the developments in the law of Property, Possession, Servitudes, and Obligation; and the revolution effected in the department of Inheritance by the appearance of *fideicommissa*, and the equitable reforms of the edict and senatorial enactments. Lastly, there is a chapter descriptive of the formulary procedure; its gradual evolution from the earlier system; its leading features, and the elasticity of its remedies; the substitution for it of procedure '*extra ordinem*'; and the peculiar methods of redressing wrong, such as interdicts and *in integrum restitutio*, which flowed from the *imperium* of the magistrate, not from his *jurisdictio*.

This brief review of perhaps the most interesting part of Professor Muirhead's book will enable the reader to judge in some measure of the thoroughness with which he handles his topic. There is indeed but one question of the many which have a genuine historical interest that (apparently by inadvertence) he has not included in his exposition; that, namely, of Agency in acquisition, the history of which forms one of the most curious chapters in Roman law. The later portions of the book will probably be thought less interesting than the earlier; no doubt the subjects with which they deal are duller and less attractive. In truth, the first two hundred pages abound in good things. Particularly excellent is the exposition, in the fourth chapter of the First Part, of the effects upon law of the reforms of Servius Tullius, to whom is attributed the distinction between *res mancipi* and *res nec mancipi*; here the author suggests a novel and taking explanation of the terms (p. 61), and emphasises the influence of the plebeians on legal forms and institutions. Even better perhaps is his account of the early Roman Contract system and of the *legis actiones*. The thorny paths of *Nexum* are trodden with unusual skill and judgment, and new and independent light is thrown on the problems suggested by the almost hopeless passages of Livy, Varro, Festus, and Gellius on this and the cognate subject of *manus injectio*. Among the points upon which new views are advanced, or at any rate first brought to the notice of most English readers, are the original meaning of the word *jus* according to M. Bréal (p. 19); the cause of the agnates being separated from the other members of the family for the purposes of succession and guardianship (pp. 43, 114, 122, 172); the functions of *judicis postulatio* (p. 199); the reasons for the introduction of *condictio* by the *Lex Silia*, which the author connects with the virtual abolition of *nexum* by the *Lex Poetilia* (p. 230), and an ingenious speculation of Danz as to the place where the stakes of the *sacramentum* were deposited, which seems to throw an interesting light on the early English Law of Distress (Note E, p. 445).

So far as he touches on the more difficult questions of constitutional and legal development Professor Muirhead wisely shows the caution and freedom from dogmatism which the silence or vagueness of the authorities in fact necessitate. Nowhere is this attitude more happily shown than in his account of the organisation and legislative authority of the plebs. No matters are so absolutely consecrated to conjecture as the relation between the *concilium plebis* and the later plebeian *comitia*, the constitution of the latter, and its identity or non-identity with the *comitia tributa*. The view somewhat hesitatingly adopted here is that the resolutions of the *concilium plebis* (*plebiscita*) had no indisputable authority even among the plebeians themselves until the year A. U. C. 283, and that they still did not bind the citizens at large unless ratified by a *senatusconsultum* (p. 84), the

necessity for which was dispensed with by the *Lex Hortensia*; while the *comitia tributa*, created (as Mommsen holds) by the *Leges Valeriae Horatiae*, were presided over by the consuls, and were open to patricians no less than to plebeians, though their enactments did not require the assent of the senate, but that of the *comitia curiata*. Upon the vexed question of the *jus gentium* and its relation (if any) to the praetor's edict, a middle course is steered between the extreme views respectively represented by Sir Henry Maine and Professor E. C. Clark. It 'was not built up by the adoption of one doctrine or institution after another that was found to be generally current elsewhere' (p. 240), but 'it is but reasonable to assume that, in many directions at least, the greater impetus must have been given to it by the peregrin praetor, moulding and modifying the *jus civile* to suit peregrin requirements where that was possible, and where it failed introducing a *jus honorarium*.'

Partly indeed from the care with which the book is written, partly from the caution which the author displays when he touches upon controversial matters, the critic will meet with not much in it to find fault with, though here and there there are passages which require slight correction or reconsideration. One defect which occasionally presents itself, and which perhaps is explained by the author's nationality, is that of solemnly considering the tenability of views which no one ever really intended to be weighed in the balances. For instance, on p. 41 the dictum that natural is older than civil law, put forward by Justinian (after a passage of Gaius in the Digest) as a reason for discussing natural before civil modes of acquisition, is too seriously referred to in support of the hypothesis that the conception of a *jus naturale* was known to the Romans in the age of the Kings: and in the same place the theory that before the time of Servius Tullius no property was recognised in moveables is discussed with what seems an unnecessary show of gravity. Sometimes too he speaks without chapter and verse: as where (on p. 299) he says Gaius is the only lawyer who identifies *jus naturale* with *jus gentium*: in his company at any rate are Cicero (De Off. iii. 5. 23), Paulus (Dig. 50. 17. 84. 1), and Marcianus (Dig. 1. 8. 2 and 4). So too, though the statement on p. 257 that the praetors are nowhere in the texts spoken of as the special mouthpiece of equity as distinguished from law may be true in the letter, those acquainted with the legal changes effected by the Edict will hesitate to draw the inference which it suggests, but rather cling to the old-fashioned idea expressed in the dictum of Marcianus—'ipsum jus honorarium *viva vox* est juris civilis.' Most people again will probably not assent to the view that the *mancipatio* was older than *in jure cessio* (p. 144), which contains by implication the proposition that *res nec mancipi* could always be alienated by bare delivery: a notion not as yet much in favour, and strongly discountenanced not only by all historical analogy, but in particular by Isidorus' definition of *fiducia*. The account of the *testamentum in procinctu* (on p. 166) might lead a hasty reader to suppose a connection between it and the much later privileged military will which certainly did not exist: *procinctus* is the people in arms (Gaius, ii. 101), sanctioning wills on the eve of battle instead of at its semi-annual session in the city, and in all probability with much the same forms and precautions as were observed '*in calatis comitiis*.' The statement that both the *exceptio* and the *actio doli* were the creation of Gallus Aquilius (p. 264) can hardly stand before Dig. 44. 4. 4. 33, which attributes the former to a praetor named Cassius: besides which there is the fact that in other cases the defensive *exceptio* was usually propounded before the corresponding aggressive *actio* (e.g. *exceptio rei venditae et traditae—actio Publiciana*). That *pignus* was a mode of pledging

confined to moveable property (p. 267) is altogether unsupported by evidence, and is in fact disproved by Inst. iv. 6. 7. The clause of the *lex Ælia Sentia*, which required the manumitting master to be over twenty years of age, seems to have had a stronger operation than is attributed to it on p. 337: by comparing Gaius, i. 38, with Ulpian, Reg. i. 13, and putting both passages alongside of those in which these writers speak of the requirement that the slave should be over thirty, it is pretty clear that defect in the master's age made the manumission void and did not merely modify the status of the manumitted slave.

Many of Professor Muirhead's readers will perhaps think that the style of his book, which as a rule is lucid and interesting, is somewhat marred by the frequent recurrence of terms and phrases which sound strange and uncouth to English ears. Most of these are undoubtedly Scotticisms, such as condescend on (in the sense of 'specify'), implement (meaning 'fulfil'), tutory, curatory, compulsitor, impignoration, dubiety, certiorate, test, outwith, &c., &c. But some 'dubiety' will be felt whether such terms as theftuous (p. 132) and doleful (meaning 'fraudulent,' p. 142) are not a burden too heavy to bear. These are, however, but small matters. The book supplies a real want, and is a valuable addition to the small number of volumes on Roman law in the English language which possess any solid merit.

J. B. M.

Die Menschenhülfe im Privatrecht. Von Dr. J. Kohler. Jena: Gustav Fischer. 1886. 8vo. 141 pp.

The term 'Menschenhülfe' is used by Professor Kohler to denote the assistance rendered by one human being to another in a case of emergency, and the object of his treatise is to explain how far private law takes notice of voluntary acts of this nature. The rules of Roman law on the subject are discussed in detail, but there are numerous references to other systems, including some notes on English law.

When assistance of the kind referred to has been rendered, the law interferes in two ways: it relieves the party who has received the help from the consequences of acts or promises influenced by duress; and, on the other hand, it entitles the party who has rendered the help to be indemnified for his outlay.

As regards the first class of cases, the author is careful to distinguish between two kinds of circumstances. The mere fact that a person, while under the influence of one paramount motive—strong enough to extinguish all other motives for the moment—has entered into an onerous bargain, does not entitle him to relief. If it did, the majority of mankind would be deterred from rendering assistance to helpless persons. In those cases only in which the duress is produced by the act of the person who derives a benefit from it with the intention of obtaining that benefit, the Roman law applies the 'actio quod metus causa'—an action which gave most effectual relief, because being 'in rem scripta,' it followed the property alienated under duress into the hands of innocent parties. In all other cases there may be circumstances which justify a modification of the bargain, or a recovery of the surrendered object—e.g. by 'condictio ob turpem causam'—but the 'actio quod metus' is not allowed, and the transaction is not voidable on the ground of any general principle.

'Menschenhülfe' was particularly recognised by the principles of 'negotiorum gestio.' A person who had in a proper case incurred any outlay in the protection of the goods of another person, unable on account of

absence or incapacity to act for himself, was generally entitled to the re-imbursement of his outlay to its full extent, not merely in so far as the owner of the goods was benefited by his help. Professor Kohler strongly criticises the assumption of an implied request or assent in such cases, though he admits that the Roman jurists have adopted the fiction to a certain extent, and though in one instance the positive law has been influenced by it, much to the disadvantage of its consistency. The protection of the helpless seems to him the main object of the rules about 'negotiorum gestio.'

It is obvious that rules of this nature will defeat their own object, unless surrounded by proper limitations and safeguards. There must be a real need of active intervention, the owner of the goods must be unable to act for himself, and he must be either unwilling or unable to abandon the goods. It is not necessary that the 'gestor' should act of his own free will; his intervention may be compulsory, or he may act as the agent of a third party. A misapprehension as to the person of the 'dominus,' or as to the effect of the gestor's activity, does not invalidate his claim, but it is essential that the main object should be the protection of an interest distinct from his own. These and other points are discussed with great force and lucidity, and a concluding chapter touches on the question of reward.

The treatise is a valuable contribution to the philosophy of law, and is full of positive information conveyed in a pleasant and fascinating manner. E. S.

Philosophie du Droit Civil. Par Ad. Franck. Paris : Félix Alcan. 1886. 292 pp.

M. Franck, the distinguished Professor of the Collège de France, is a veteran on the subject of the book before us. It is the cream of his lectures during several years.

The author is a practical idealist. He has no understanding for materialism, and like Dr. Johnson he is content not to enquire farther than his own feelings. The doctrine of free-will will not be destroyed, he thinks, by Mr. Herbert Spencer and his followers. However, he 'will take care not to refute all the opinions' of these gentlemen 'one by one,' as to do so he would require to enter the domain of pure philosophy. 'Still,' he adds, 'we live in an age of positivism, and I shall set up one fact against these theories. It is that we know that we are a person, an indivisible ego and that that ego is free' (p. 6). He bases his philosophy of law on this freedom of volition. 'The respect the human person commands,' is, according to him, 'the sole foundation of law and the supreme end of legislation.'

M. Franck sets forth, from this point of view, the ethical justification of different branches of French civil law, treating in turn of personal freedom, marriage, divorce, paternal power, property, testamentary power, successions and copyrights. He gives on the subject of property an interesting analysis of the theories of Proudhon, and under marriage another of Michelet's morbid sentimentality, both of which he endeavours to refute.

The book is pleasant reading and not intended to be a profound inquiry into the subject with which it deals. T. B.

[If M. Franck wants to meet with a really subtle and profound English adversary on his favourite topic of free-will, we commend him to Mr. Shadworth Hodgson.—Ed.]

Revue Internationale de Droit Maritime. Publiée par F. C. Autran. Paris: Chevalier-Maresecq et Cie. 1885–1886. Nos. i–ii, iii–iv, v–vi of 1886–1887.

The fertility of the French in the production of legal periodicals is a sign of the scientific activity of the legal profession across the Channel. The briefless barrister in France courts the patronage of his seniors by writing in the legal journals likely to come under their notice or by doing the druggery of legal societies. There is hardly, if one, a French legal periodical that can afford to pay a contributor for his work; yet there is no lack of ready pens willing to undertake any trouble for the prospective return of the public notice resulting from the printing of their signatures to articles. Among the forms of labour to which young French advocates are most ready to subject themselves, is the analysis of foreign legal enactments, cases and literature, and the comparison of foreign laws and institutions with those of their own country. To this we now owe three valuable publications, the *Bulletin de législation comparé*, the *Journal de droit international privé*, and the one which M. Autran, a persevering advocate of Marseilles, brought out a little upwards of a year ago, the subject of the present notice.

In form and text he has adopted that of M. Clunet's *Journal*, which is convenient though the type is rather small. He has also followed M. Clunet's example in bestowing much care on the index.

In the first volume we find reports of maritime cases decided in Germany, Austria-Hungary, Belgium, Brazil, Sweden, Denmark, Egypt, the United States, Greece, Holland, Italy, France, and Great Britain. It also gives portions of the maritime codes of different States. The utility of these, unless supplied in a complete and regular manner, after the fashion of M. Fiore-Goria's *Rassegna di diritto commerciale*, we think, however, questionable, but M. Autran will of course be able to improve his review with experience. Each number contains one article besides the above matter on a subject within the scope of the publication.

It is seen that M. Autran has undertaken a good practical task, calculated to render service to all who are interested in the maritime laws of different States. T. B.

The Bankruptcy Act, 1883, *and Rules*, 1886. By His Honour Judge Chalmers and E. Hough. Second Edition. London: Waterlow & Sons, Limited. 1886. 8vo. xii and 641 pp.

The new matter added to the second edition of this useful commentary comprises the Bankruptcy Appeals (County Courts) Act, 1884, the Bankruptcy (Agricultural Labourers' Wages) Act, 1886, and the Rules of 1886. The changes effected by the new rules may be readily traced by the help of the table on pp. 517 and 518. The introduction gives an interesting historical sketch, and reproduces a summary of the novel features of the Act of 1883 prepared by the Board of Trade. There is also a short statement about foreign bankruptcy law, which, though concise and well-arranged, is not free from inaccuracies. One rather serious mistake ought to be pointed out. It arises from the fact that the etymological equivalents of 'bankruptcy' (Bankerutt, Banqueroute, Bancarotta) have been assumed to convey the same meaning as the English word, while in reality the codes apply them only in the case of certain well-defined offences which subject the debtor to criminal proceedings, the words 'simple' or 'fraudulent' being added according to the nature of the particular offence, and other words (Konkurs, faillite, fallimento) being employed to express bankruptcy

in the English general sense. The statement that 'the foreign codes seem to consider a bankrupt as *primâ facie* a criminal' is incorrect if the word bankrupt be used in the English sense, and tautological if it be used in the sense of the foreign codes. The following sentence, 'The onus appears to lie on him to show that his failure was due to misfortune and not to misconduct,' is incorrect in any case; when criminal bankruptcy—simple or fraudulent—is alleged, the ordinary criminal procedure is applied and the general rule about the burden of proof is not departed from.

In every other respect the book deserves unqualified praise. The notes are free from redundance and unnecessary reiteration, and seem to explain everything that wants explaining in language which, though precise, is easily intelligible to lay readers as well as to lawyers (see, for instance, the notes to §§ 28, 44, and 102); some very useful indications have been added about matters, not strictly belonging to bankruptcy law but connected with it (for instance, the note on private arrangements, pp. 36–37, and the note on the rule 'ex parte Waring' on p. 50); there is no unnecessary crowding of authorities; the cross references are complete (the only omission we have noticed is in § 28, where the instances of misdemeanours under the Act might have been referred to), and the index seems perfect. The editors have taken particular pains in pointing out the effect of the Act on decisions based on previous Acts, and the useful plan of giving the dates of the cases quoted saves the reader much trouble.

The Act of 1883 has now been in force for some time, and no serious fault has been found with its main principles. Any one acquainted with the routine of business will know that it is futile to expect traders to take any trouble about their bad debts. The public interest, which ought to be the main object of a sound bankruptcy law, will, therefore, be most efficiently promoted, if bankruptcy is, as much as possible, under the control of the public authorities. The objection that a stringent bankruptcy law promotes private arrangements is not of a very cogent nature. If private arrangements be an evil, surely a system lax enough to make bankruptcy proceedings more desirable to the debtor must be a greater evil.

It is curious that one characteristic point of English bankruptcy law has received so little attention. There is nothing in the foreign codes corresponding to our order of discharge, and the whole aspect of bankruptcy is materially altered by this fact.

There are still many points about which the law is uncertain, and others with regard to which it might be improved, but not much can be hoped, as long as merchants and other business men take so little interest in matters which mainly concern them. Such an interest can be promoted by those who present the actual law in a comprehensive and intelligible form, as the editors have done in this book.

E. S.

A Compendium of the Law specially relating to the Taluqdars of Oudh. By John Gaskell Walker Sykes. Calcutta: Thacker, Spink, & Co. London: Reeves & Turner. 1886. 8vo. x. 417 and 17 pp.

Many readers will still recollect the acrimonious debates which took place in Parliament in 1858 regarding the annexation of Oudh, the Mutiny, and the consequent confiscation of rights in the soil and the re-grant of them to the Taluqdars.

The virulence of the debate, as far as it related to landed rights, was largely due to the fact that neither party had any clear idea as to what, in

origin and growth, the Taluqdar's position really was; nor indeed were these matters fully or dispassionately understood till long after.

The difficulty of the case stood in this, that the Taluqdar was neither the 'real ancient landowner of the country,' as some would have it, nor was he the 'mere creature of the Nawab's Revenue Office,' as others asserted;—he was something of both. When the Nawabs took the government, they found the condition of the province, as to landholding, very much what it originally was in many other parts of India. The land was grouped (as everywhere in India) in what (for want of a better name) are called 'villages.' The village was held by a group of cultivators, each tilling and owning his own cleared holding, and managed by a 'Muqaddam' or headman. The villagers were largely clansmen (not however without an admixture of other castes). All owned military allegiance and feudal following to a Raja, whose Rāj or state was limited in extent. Every village in the Raj (not expressly excused) paid its revenue—originally a share of the grain produce—to the Raja. The revenue-subdivisions, still existing and called 'Pargana' by the Muhammadan rulers, coincided (to some extent at any rate) with the old Rajput States, hence these are known to us. The Rajas, unable to resist the Mughal power, received grants in return for their submission, and had to pay a portion of what they received from the villages (and from their own estates too) as revenue into the treasury at Lucknow. In other respects their position remained unaffected. But as the corruption and extravagance of the Nawab's court progressed, the desire to grasp more revenue became predominant; and to effect this purpose the Rajas had to be set aside and collections made from the villages direct. Unfortunately such a plan can only succeed in well-ordered times and under close supervision, and both elements of success were conspicuously wanting. Then it was that the Nawabs fell back on the usual oriental resource of getting some wealthy and influential persons to contract for specific areas of country. Such areas, called in Oudh 'Taluqas,' naturally in many cases fell into the hands of the old Rajas. But not always; for local landowners, whose wealth or influence was considerable, court favourites, and former revenue officers also got Taluqas. They had to pay a fixed sum to the treasury, and managed the villages as they pleased; getting what they could out of them. They oppressed the people (but not always), fought each other, forcibly took possession of villages, and generally so conducted themselves as, in the end, to get the virtual proprietary possession of a great number of villages. There is, however, a certain limit to Eastern land-oppression; the goose that lays the golden eggs cannot be killed; and cultivation becomes impossible if extortion is resorted to too freely. Hence the Taluqdars by no means extinguished all ostensible rights under them. Moreover, whatever may have been the original form of the villages directly under the Raja, grants were made by him in return for money aid, members of his family got gifts of villages for their maintenance, and many other similar and dissimilar means existed whereby proprietary villages grew up having the original cultivators as their tenants, and too strong to be much injured by the Taluqdar, and in not a few cases constituting an effective intermediary between him and the cultivator. The Taluqdar was therefore not everything; nor had he obliterated all other landed interests except his own.

When Oudh was annexed, the whole official staff were accustomed to the village settlement of the North-West Provinces. No one could have thought of settling the land except upon north-western principles. Under that system Government engages for its revenue on a given area, usually a village, with a body or an individual; and it is therefore impossible to avoid a

determination of the question of soil-ownership, because the person who engages is the owner, or rather *vice versâ*.

At first it was hastily determined to ignore the Taluqdars altogether; but the Mutiny quickly put an end to that. Then the Taluqdar was recognised as superior owner, and to be settled with: except, of course, in cases where an independent proprietor existed, whose land had always paid direct and had never become part of a Taluqa. Such owners were recognised, and if of sufficient importance, also got the title and status of 'Taluqdar.' This being determined, at once various subsidiary questions arose. Who should succeed on the present Taluqdar's decease? Would the estate be divided according to the Hindu law? If so, the 'landed-aristocracy' would soon go to pieces. Could Primogeniture with or without entail be enforced? Then again, what was to be done to protect the village owners under the Taluqdars; for these too had rights often considerable, and if they had been over-ridden, that might be a matter of tyranny and usurpation which it was by no means too late to redress. The plan adopted—called making a sub-settlement with the village proprietor—was one which fixed the dues of the village owner to the Taluqdar, just as the settlement did those of the latter to the Government. And as the extent and nature of the inferior rights varied, it was a question which required careful consideration (and detailed rules in the end) as to what cases called for a sub-settlement and on what terms, and what cases were sufficiently protected by a mere record of the rights as they existed. Nor did the difficulties of tenure-law end here. It might perhaps be supposed that the Taluqdar's rights being granted and the rights of the land-holders under him protected, all other cultivators must be mere tenants at the pleasure of the Taluqdar or of the village sub-proprietor, dependent on contract for the time. But in India there always has been a party anxious to discover tenant-right (and in some provinces and districts with ample justification, owing to the facility with which, in the decadence of native governments, rights get over-ridden and partly lost). It was denied, however, that in theory any such thing as tenant-right was known in Oudh. But in the absence of any Eastern legal system of rights, theory is not always sufficient; and it was thought that circum-tances might exist which would justify the settlement officer's interference, to protect the occupancy and limit enhancement of rent in some cases. Here then was new scope for a discussion which proved long and accentuated by divergent views, and ended in the Rent Act of 1868.

Thus in a few paragraphs a bare outline has been given, which will suffice to indicate how a body of Indian Statute Law, which provides for these various questions, grew up in Oudh; and it is this set of Acts which Mr. Sykes has now collected together and commented on.

There are Acts defining the nature and incidents of the Taluqdar's title; regarding succession, partition, bequests and so forth (1869 and 1885). There is the Act regulating Sub-Settlements (1866), the Rent (or Tenant) Act, and the Land Revenue Act (1876) which describes the form and process of a Settlement of the Land Revenue, the records required, the powers of officers both in making the settlement and in realising the revenue after its due assessment. To these laws Mr. Sykes has added certain others passed to relieve a number of Taluqdars whose estates had become encumbered. The text of the Acts is interspersed with explanatory comments and references to decided cases. Not the least valuable part of the book are the ample extracts it gives from circular orders, rules, and proclamations, which are of the utmost importance to the revenue history of Oudh, but are generally inaccessible to the student.

The collection of Acts is preceded by a historical sketch or study of the rise and progress of the Taluqa, the official discussions about the rights, the question of sub-settlements, and the tenant-right correspondence. The local varieties of inferior proprietary holdings are also described in some detail.

Mr. Sykes disclaims the title of historian, nor could he aim at literary form and excellence. It is therefore unnecessary to say more than that the introductory chapters are appreciative and careful. They will not, however, prove easy reading to any one wholly unacquainted with Oudh affairs. Read with a previous general idea of the subject, they will be found to state fairly and with moderation the principal facts of the history of Oudh tenures. The book has one valuable feature, the ample extracts from and references to the very words of original orders and state papers,—a matter of considerable importance, when it is recollected that the ground gone over has at many points been the battle-field of official disputants, and that positive and even violent assertions have been made in directly opposite senses on many of the subjects which it was Mr. Sykes' object to make clear to his readers.

Year Books of the Reign of King Edward the Third. Years XIII and XIV. Edited and translated by Luke Owen Pike. Rolls' Series, 1886. xciii and 402 pp.

Mr. Pike is still engaged in filling up the blank which occurs in the old editions of the Year Books between the tenth and the seventeenth years of Edward III. The hopes raised by the volume which he published in 1885 are justified and confirmed by the book before us. He seems to be doing all that an editor should do with patient and exact care. If only all the Year Books were edited in the same manner, the gain to all students of legal history would be inestimably great. A new edition of the old books must some day be taken in hand; Mr. Pike is showing us both how laborious the work will be, and how it may be successfully accomplished. He speaks of the 'very favourable reception . . . given to the attempts made in the last volume to identify and compare the reports with the corresponding records.' We are very glad that the reception was favourable, since it has encouraged him to even more thorough efforts after a most desirable object. It seems to us of the very first importance that, whenever this is possible, the editor should find and read the record and note whatever in it gives any help towards the understanding of the report. Often most valuable help may be thus obtained. To take one obvious example:—On p. 289 Mr. Pike gives a case in which the question is from which of two venues a jury shall come; a report found in certain manuscripts gives one decision; an independent report found in another manuscript gives a diametrically contrary decision; the record decides the conflict with conclusive authority; one report is correct, the other is incorrect. Often again it is very difficult for anyone living at the present day to make out what is really the question in debate between the lawyers whose sayings are reported. The reporters assumed in their readers a knowledge which hardly anyone, if anyone, now possesses. A vast deal of perplexity and guess-work may be saved us, if the editor can and will tell us briefly what are the pleadings on the roll, and what was the judgment of the court. Mr. Pike has not said a word too much about the record. Of course, allusions to the rolls and the printing of different reports of the same case whenever, as not unfrequently happens, materially different

reports can be found, will swell the bulk of the Year Books. On this occasion a whole volume is taken up with two terms. But there should be no hurry and no false economy; if the work is worth doing at all it is worth doing well, and therefore slowly.

Mr. Pike has commented in a full, but not too lengthy, introduction on some of the most striking cases. We are glad that he has been permitted to do this. It is true that a similar permission has been sometimes abused by those who have been trusted to prepare books for the Rolls' Series; but if a man has really taken pains over the translation of a mediæval law-book, he will generally have many things to say about his work which will be worth saying, and new to most of his readers. Thus there is a case, *Staunton* v. *Staunton* (p. 27), which seems at first sight a particularly dreary business, but by printing two widely different reports and referring to various rolls, Mr. Pike has made an interesting and instructive story, which puts before us vividly and accurately the relation between the Parliament, the Council, and the two Benches. He has some valuable remarks on the resemblance between the petitions sometimes addressed to the Council during the progress of the cause, praying (for the love of God) some interference with the ordinary machinery of justice, and the bills in Chancery of a somewhat later time. Also what he says of the *secta* or suit, really or professedly produced to testify to the truth of an allegation, deserves consideration. The history of the *secta* is, as Mr. Justice Holmes and others have shown, a promising subject-matter for explorers. Certainly in the middle of the thirteenth century one may find case after case in which a plaintiff is defeated because he has no suit, or an insufficient suit, and the members of the *secta* were not unfrequently examined by the court. Here there seems to have been a foundation for a reasonable modern system of requiring and examining witnesses. But, for some reason or another, the institution perished; parties were allowed to put themselves upon the country without first making good a *primâ facie* case. Early in the fourteenth century, the production of suit seems to have become fictitious. How this came about would be well worth inquiry. That inquiry must deal with a time earlier than the years with which Mr. Pike is now concerned. He maintains, however, what we make no doubt is the sound view, that the *secta* did not give evidence before the jury. The *sectator* is not the progenitor of the modern witness; the pedigree of the modern witness must be traced to some other stock. The ordinary account of the process whereby jurors ceased to be witnesses and became judges of fact does not seem very satisfactory, or at all events very complete, since it deals only with the quite small class of cases in which the execution of a deed is in dispute. The spread of a new procedure from these cases to others is conceivable, but not as yet fully attested. Mr. Pike, therefore, has done well in drawing attention to a pleading in which a certain fact, namely, the tender of a marriage, is alleged to have taken place in the presence of three named persons. He raises, but does not profess to solve, the question, What was the use of naming these persons? This point would have been missed, be it noted, if he had not examined the record. This indication of a possible production of witnesses before the jury should be followed up—it does not stand quite alone—some valuable results might thus be obtained by anyone who would be at pains to read the rolls. Finally, we may say that this Year Book seems to us a particularly interesting specimen; but this may be because Mr. Pike has put it before us in a very intelligible and useful shape.

Lehrbuch der Pandekten von L. Arndts R. von Arnesberg. Dreizehnte durchgesehene und vermehrte Auflage, besorgt von Dr. L. Pfaff und Dr. F. Hofmann. Stuttgart: J. G. Cotta. 1886. La. 8vo. xxii and 1141 pp.

Few, if any, books have in our time exercised a greater influence on legal studies than the 'Pandekten' of Arndts. Most German professors use it as a guide to their lectures, most German students read it in preparing for their examinations. And having long been studied in all parts of the Austro-Hungarian Empire, it has naturally influenced Slavonic legal literature and legislation in the East of Europe. No less important has been the influence of the book in Italy, where an excellent translation by Professor Serafini has given it a very wide circulation. Serafini, however, does not restrict himself to reproducing the German original, but he has worked into the text the results of his own studies, carefully taking account of the literature, the decisions of the courts, and the legislation on private law in Italy and the other Romance countries, and has thus secured for his work a significance and value of its own. This great success of Arndts is to some extent due to the practical convenience of its arrangement. The whole text of the work is divided into paragraphs which contain a very short and precise statement of the law on the topic which is dealt with, while subsequent notes, in small type, go into detail, especially stating the different controversies, and quoting the references to the literature and the sources of law. Thus the book, although it covers so large a field as the detail of the modern Roman private law, is still of a relatively handy size and moderate price.

In England, where Roman law as a whole has never been received, a book dealing with this law in detail cannot possibly exercise an influence similar to that which is secured to it on the Continent. But there are at the present time a considerable number of people working diligently at Roman law, and a still more considerable number working at English law with continual reference to Roman law, and especially to the literature which has grown up in expounding the contents of the Corpus Iuris Civilis since the time of the Glossators. Students and scholars of this kind will welcome the present edition of Arndts' 'Pandekten' as a trustworthy and precise source of information on the subject of their researches.

Shortly before the celebrated author died, on March 1, 1878, he had asked the two professors, Pfaff and Hofmann, of the University of Vienna, to prepare a new (the tenth) edition of his text-book. This was no slight a task, for Arndts himself had been unable to take full account of all the new literature which had accumulated in the last twelve or thirteen years of his life, and for the most part he confined himself to mere quotations. Besides there were, as would naturally occur in a book full of references, and specially of figures, many misprints which had crept in in the course of time, and which could not be removed by the author himself, whose eyesight had for many years been very defective. It was impossible for the two editors to remedy both these defects in the new edition. They therefore addressed themselves mainly to the correction of errors of the kind above-mentioned, looking out the many thousands of passages quoted by the author, comparing and verifying every reference. This was a task which required all the industry, care, and patience of which a German scholar is capable. In the editions subsequent to the tenth, the eleventh, the twelfth, and the present edition, all the new literature, so far as it had not yet been utilised, is not only referred to, but its results are worked into the text and the notes of the

book, so that these three editions represent the state of the legal literature of the Continent at the time of their publication. In addition to this, the new editions contain in connection with the single topics dealt with a short statement of the new Imperial law, so far as it concerns private law, an addition which is highly valued by students whose attention is naturally fixed on the actual law in the application of which they will take a share in future.

There is, however, one thing which is to be regretted, and which is admitted to be a defect by the editors themselves (p. 1121). The printing of the present edition extended over a period of more than two years. The consequence was that numerous books could not be referred to in their proper place, that portion of the work being already printed. The editors therefore were obliged to add an Appendix (pp. 1121–1141), which is an account of the whole literature up to the month of May of the present year. It will perhaps interest some of our readers if we add that in these supplements Dr. Grueber's Lex Aquilia is not only cited, but its main contributions to the doctrine of damage to property are also shortly stated (p. 1127; Zu § 84–86, and p. 1139: Zu § 324. Anm. 1, 2, 3, note h, Anm. 3 a).

Registration of Title to Land, and how to establish it without cost or compulsion. By Charles Fortescue Brickdale. London: Edward Stanford. 1886. 8vo. viii and 126 pp.

This is a useful and most readable book on a very difficult subject. The author brings into prominence 'the great fact . . . before which all other facts are insignificant . . . that registration of title has succeeded in Australia and failed in England.' In England, not more than about 500 landowners have registered their titles under Lord Westbury's and Lord Cairns' Acts, while within eighteen months from the passing of the South Australian 'Real Property Act,' there were more than 1000 applications to register property under it, i. e. more than one application to every hundred persons in the Colony! The author successfully shews that most of the alleged facts which have been brought forward to explain this are either not facts at all, or have nothing to do with the observed phenomenon. These are:—

1. The comparative facility with which Australian titles can be placed on the Register in the first instance owing to their recent origin in a definite Crown Grant.

Answer. The simple Australian title starting with an unimpeachable Crown Grant is not very common, for many of the Australian titles are more than sixty years old, and owing to unskilful conveyancing and other causes the early titles are most complicated.

2. The ease with which registered land can be described in Australia owing to the Government Survey upon which all grants are founded.

Answer. This statement is a pure invention of English people unacquainted with the fact that owing to the inaccuracy of the Government Survey in Australia, it was really one of the greatest impediments to registration of title that had to be encountered.

3. The prevalence in England of settlements importing difficulty into registered dealings.

Answer. Not one single opinion propounding this argument is the result of experience; many eminent English authorities think that there is nothing in it. The entire weight of Colonial experience is that settlements create no difficulty in bringing the title on to the Register.

4. That the advantage in this country is not tempting enough to induce

the majority of landowners to incur immediate expense or inconvenience in order to obtain it.

Answer. A purchaser constantly requires a quantity of formal evidence from a vendor whose title he is perfectly satisfied with 'solely to be able to satisfy future purchasers or mortgagees.'

5. Registration was not altogether voluntary in the Colonies, so that a large sample of registered land was quickly made from which other owners were advertised of the advantages of the system.

6. The failure of Lord Westbury's Act threw a blight over the whole thing, and Lord Cairns' Act never had a chance.

Answer. 5 and 6 might be a reason for our progress being slower than in Australia, they do not account for our process stopping altogether.

The author's explanation of the different fate of registration of title in England and Australia is that the one gives an *indefeasible*, the other a *guaranteed* title. It requires some little thought to work out for oneself the mighty difference between titles of this nature; the author's explanation, which every person interested in law reform ought to read for himself, is to the following effect.

An indefeasible title under the English Acts gives to the registered owner an absolute right to the land, so that any mistake made by the registrar may deprive an innocent person of his land. It follows (1) that a cautious person does not like his title to be registered, as he may lose his property owing to a fraud being practised on, or a blunder being made by, the registrar; (2) that the work in the office is necessarily conducted under most stringent and therefore costly regulations, so that not only is the original registration more costly than a purchase under the usual conditions, but on every subsequent sale the office proceedings cause much delay.

On the other hand, in Australia registration does not confer an *indefeasible* but a *guaranteed* title, supplemented by the rule that if two inconsistent titles are on the register the first prevails, and the registered owner under the latter title is left to obtain his indemnity. The result is that no man can lose his land through a fraud practised on, or the error of, the registrar; and that it is not necessary to make a stricter investigation of title than is required on an ordinary purchase. The indemnity fund is provided for by a small payment on every transfer.

The author proposes and explains very clearly the scheme of registration that he prefers for this country; it is in fact Lord Cairns' Possessory Registration without official investigation of title, supplemented by a guarantee by Government. He points out that the vexed question whether registration should be conclusive as to boundaries may be avoided by guaranteeing them.

It is impossible in the space to which this article is necessarily restricted to explain the author's system at length, but we feel the less regret in being unable to do so, as we believe that the merits of his book are so considerable that it will quickly make its way into the favour of, and be read by, that small number of people who are competent and willing to form an opinion as to the merits of the conflicting schemes for the Reform of the Transfer of Land.

The Bills of Sale Acts 1878–1882, *with an Introduction, Notes, and Form.* By G. B. L. Woodburne. Manchester: John Heywood. 1886. 8vo. viii and 67 pp.

In this handy little book the author has arranged the Bills of Sale Acts of 1878 and 1882 in parallel columns, and introduced, in the notes between

the sections, the cases which have been decided upon them. A short introduction explains the object of the two statutes, and in a precedent, appended to the work, the ordinary terms for maintenance and defeasance of the security are filled into the scheduled form.

The absence of a list of cases detracts from the practical value of the book. The want of headings to the pages renders it difficult to find the sections of the Act of 1882, which have been transposed in order to suit the corresponding sections of the Act of 1878; and the first paragraph of the introduction strikes us as a little misleading in saying that 'in 1878 the statute (was passed) which, with the further Amendment Act of 1882, *now governs all* bills of sale,' as this seems to ignore the fact that the repealed Acts of 1854 and 1866 are still applicable to bills of sale executed prior to January 1, 1879.

We should also like to have seen the intricate question of fixtures, as connected with bills of sale, a little developed, and some expression of opinion on the legal effect of the Bills of Sale Acts upon the attornment clause in mortgage deeds. We must further confess to feeling somewhat in the dark on the subject of debentures, by being referred to the case of *Ross* v. *Army and Navy Hotel Co.* (2 Times L. R. 834), whilst at the same time we are told at p. 47 that 'the question was not raised;' and the following brief statement (p. 46) leaves us still more in the dark on a matter of the gravest importance in respect of bills of sale:—'The reputation of ownership may be rebutted by evidence of notorious custom in the various trades. There are numerous cases on the subject.'

We would add that we have looked in vain for cases of the class of *Walrond* v. *Goldmann* (16 Q. B. D. 121) dealing with the question which, in various forms, will be more and more developed as time goes on, viz. the power of a married woman, without making her husband a party, to execute a bill of sale of chattels which before the marriage belonged to her, but which after the marriage are ostensibly in his possession.

Apart from these shortcomings, the task of collecting and epitomising the numerous cases reported since the two Acts came into operation, has been carefully performed, but we very much doubt whether an attentive study of this work would enable any one to draft a bill of sale which would satisfy the reasonable demands of the grantee on the vital point of efficient security, and we are quite sure it would not enable any one confidently to assert or deny the validity of the majority of the bills of sale at present on the register. The reason for this is, that, in the present unsettled state of the law, the multiplication of books of this sort in no way tends to solve the vexed question—What is a substantial compliance with the form in the schedule to the Act of 1882? for many of the cases cited as authorities in this book are now under appeal, and some of the more important, as for example *Goldstrom* v. *Tallermann* (17 Q. B. D. 80) and *The Official Receiver* v. *Tailby* (17 Q. B. D. 88), have already been reversed (W. N. 1886, pp. 175, 181).

It is notorious that the number of recent decisions in the Court of Appeal, in favour of the execution creditor, has raised enormously the rate of interest charged by the defeated money-lenders. No good can result from this. It is simply a revival in an indirect form of the evils of the usury laws, for it practically prevents the borrowing of money, upon this class of security, at a reasonable rate, and inevitably leads to the evasion of the law, whether by colourable sales, or fictitious hiring agreements, or by the execution of contemporaneous unregistered instruments. Admitting that parental legislation is one of the hardest tasks that a Government can approach, still, in

fairness to the parties concerned, the parental views might be expressed in intelligible language; unfortunately, however, the profession has long since had good reason to condemn the drafting of these two Acts as amongst the very worst specimens to be found in the statute-book. What is now wanted is a work which will treat this hot-bed of litigation from the standpoint of principle, and whilst extracting from the reported cases all the guidance they are capable of furnishing, will bridge over the gaps left between these cases, and indicate the lines upon which the legislator must proceed in order to modify the definition of bills of sale in the Act of 1878 so that it will not include instruments which cannot be thrown into the form prescribed by the Act of 1882, and also point out how to enforce the system of setting out the whole contract, which is fostered by these Acts, without directly conflicting with the system of implied covenants, which is fostered by the Conveyancing Acts.

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England, the Privy Council, and the House of Lords; with a selection of the Irish cases; on or relating to the principles, pleading, and practice of Equity and Bankruptcy; from the earliest period. The fourth Edition. By Henry Edward Hirst. Volume III. containing the titles 'Ejectment' to 'Inspector.' London: Stevens and Sons, H. Sweet and Sons, W. Maxwell and Sons. 1886. La. 8vo. 2081–3070 pp.

A labour which on the 'other side of Westminster Hall' has lately taken four men to grapple with it successfully, is now undertaken by Mr. Hirst single-handed. In the first two volumes of 'Chitty's Equity Index' he had the assistance of Mr. W. F. Jones, to whom are due some ten of the fifty-six titles substantially contained in this the third volume. Although Mr. Hirst is now alone, he hopes that 'the work will make steady and continuous progress,' and that the long delays of the past will not recur in the future. We echo this wish. Few things are more annoying in a small way than to take down a volume only to find oneself referred to another which is as yet in embryo. Even now it seems not too late to repine at one omission which Mr. Hirst might easily supply. He could, without very great additional labour, add the date of each case the head-note of which he gives in these pages. Uniformity he would sacrifice if he adopted our suggestion at this eleventh hour. But the gain would be worth the sacrifice. We have the less diffidence in making this suggestion, because no labour seems too great for Mr. Hirst's industry. He accumulates references to the concurrent reports, showing clearly the four places where a case can be found as it appeared in the Divisional Court, in the Court of Appeal, and the House of Lords respectively. He chooses among two or more head-notes the one which he thinks the best. His choice of title, sub-title, and sub-sub-title is generally judicious. On the whole the work is thoroughly well done. The laborious care bestowed upon the fourth edition of 'Chitty' deserves all praise.

An index of cases is in one respect a collection of *minutiae*. It can hardly realise the ideal of excellence in every point. Mr. Hirst is on occasion fallible. Thus on the faith of the title-page we expect to find all the cases decided up to the end of the year 1883, and we do in fact find *Baynton* v. *Collins*, 27 Ch. Div. 604, and *Conolan* v. *Leyland*, ibid. 632, which were decided in July and August, 1884, respectively. But no search under

Infant-Marriage will reveal the leading modern case on this branch of the law: we refer to *In re Sampson and Wall, Infants*, 25 Ch. Div. 482, which was decided by Mr. Justice Kay on the 15th November, 1883, although the Lord Chancellor was not called into the Court of Appeal to consider the case until the 14th January, 1884. In this connexion we may observe that the collection of cases of the Infants' Settlement Act (18 & 19 Vict. c. 43), which is given in the volume before us, is not quite exhaustive. We do not find *Re Williams* (8 W. R. 678) or *Sams* v. *Cronin* (22 W. R. 204; 29 L. T. Rep. n.s. 885). Until the final volume comes with the complete list of cases we cannot tell whether these are anywhere in 'Chitty' or not. Again, it is not all the existing references that are given to some of the older cases. In the eleven cases cited in this particular province, there are wanting at least six references to the 'New Reports,' the 'Law Times,' and the 'Weekly Reporter.' These are small things, but it is only by minute examination that such a book as that before us can be adequately tested.

The practitioner will anticipate with some eagerness the complete list of cases contained in the Equity Index, which will presumably be found in its last volume. Of the rehabilitated Fisher's Digest (ed. by Mews, 1884) this is one of the most useful components. We admire Mr. Hirst's method of making the numbers of his pages run throughout his volumes. In this way he diminishes the chances of error of pen or press occurring in the final list. On the other hand we fail to understand why he should have deserted alphabetical arrangement in his sub-titles. This necessitates reference to what may be called the 'Table of Contents' of each title instead of direct recourse being had, as might often be the case, to the sub-title which is sought. The judge in a well-known story demanded of counsel some arrangement of his facts. 'Chronological is the best: but if not, let it be alphabetical.'

The Practice of the County Courts. By James Edward Davis. The Sixth Edition, edited by S. M. Rhodes. London: Butterworths. 1887. 8vo. cxi and 1203 pp.

The practice of the County Courts is getting to be an extensive subject for a single volume, and Mr. Davis's expression of his hope that his volume is 'portable . . . whether placed in the court bag or travelling case,' brings the word portable unpleasantly near to its literal meaning. This is partly because Mr. Davis gives a literal interpretation to the term 'practice.' For instance, he prints the whole of the Riot (Damages) Act, 1886, the only part of which that can in strictness be said to relate to County Court Practice being sec. 4, subs. (2), which consists of the words, 'If the amount of compensation for which such action is brought does not exceed one hundred pounds, the action shall be brought in the County Court for any district in which any part of the police district is situate.' If this principle had been observed throughout the book, it must needs have contained a very substantial proportion of the whole body of the common and statute law of England, and would probably have required more men than one to carry it about. Mr. Davis does not go quite so far as that, but he goes too far. It is not practicable to put into one book all the law that can ever be required by anybody practising in any court of jurisdiction limited, with few exceptions, only by amount. The practice in County Courts, with their bankruptcy and admiralty jurisdiction, deserves a book to itself, and would fill one of a very reasonable size.

The sixth edition, which, though edited by Mr. Rhodes, has benefited by the exhaustive supervision of Mr. Davis, has been made necessary by the issue of the new County Court Rules, and to some extent by the simultaneously issued Crown Office Rules of the early part of the present year. The Rules themselves are nowhere given, their effect, as Mr. Davis and his Editor understand it, being distributed throughout the substance of the book. We cannot but think this to have been an error of judgment. The *ipsissima verba* of the Rules of Procedure are the essential part of a book of practice. Mr. Davis's excuse is that he intended 'to supply a complete work in the smallest practicable compass.' This is an almost ludicrous description of a book containing 1314 pages, that is, considerably more than the 'Annual Practice,' in a volume about half as big again as the last edition of Wilson's 'Judicature Acts.' But the serious objection to it is that a complete work is exactly the thing which Mr. Davis has not produced. As a work of practice it is not complete, because, as Mr. Davis expressly admits, to use it properly you must have a separate copy of the Rules. Nor is it in the smallest practicable compass, because it contains a quantity of substantive law which might just as well have been left out. If it is considered as a repository for all law administered in County Courts, it does not approach completion, because the text of thousands of statutes and the substance of masses of common law administered in County Courts are not given. There is therefore no justification for the omission of the Rules, which is the principal defect in a work which, in spite of its corporeal bulkiness, has a great deal of general utility.

Charterparties and Bills of Lading. By T. E. Scrutton. London: William Clowes & Sons, Limited. 1886. 8vo. xlii and 325 pp.

The author's task in digesting the law relating to the contract of afreightment has in one respect been light. Owing chiefly to the fact that bills of lading and charterparties are expressed in the inartificial language of business men, this branch of the law is singularly free from the logical and metaphysical technicalities which afflict many portions of our jurisprudence. On the other hand, the difficulties must have been considerable. The last twenty years, as the author has remarked in his preface, have seen what almost amounts to a revolution in the shipping trade of Great Britain. Steamers have supplanted sailing vessels, and the electric telegraph has placed the centres of commerce throughout the world in immediate communication with each other. The result has been a corresponding alteration in the modes of conducting shipping business, which has not failed to leave at every step ample traces on the pages of the law. The large body of quite modern judge-made law which has thus come into existence has almost entirely outgrown and overgrown that which preceded it. It is, for instance, now of very little use to set out the 'ordinary authority of a master,' as founded on cases before 1860, when in 1886 the electric telegraph has reduced his functions even in foreign parts to little more than those belonging to the chief navigator of the ship. It demanded therefore no small degree of boldness as well as skill to re-state the law in a form suitable to its present condition.

Whatever the difficulties may have been, it is no exaggeration to say that Mr. Scrutton's mastery of his subject, from the point of view both of the lawyer and of the man of business, has enabled him to achieve as high a degree of success as the nature of the case would well admit. In matter and form alike his work is admirable.

The book is divided into twelve sections; of these the first three relate to the nature and construction of the contract, the parties to it, and the representations and conditions which expressly or impliedly precede it. The remaining sections deal with the performance of the contract, and the various rights and obligations arising out of it, beginning with the steps preparatory to loading, and terminating with a discussion of the rules as to the damages recoverable for breaches. It would be too long to enumerate even in a general way the various matters which are thus treated in their order; it must suffice to say that the author appears to have omitted no point of importance, which is likely to concern either the lawyer or the man of business.

The method adopted throughout has been to state the principles and rules of law in the form of short articles, numbered consecutively. Each article is followed by a concise summary in smaller type of the various decided cases in their order from which the rule has been extracted, which thus serve as examples of the principle previously laid down. These again are followed by a note also in smaller type, in which the author deals with any matter relating to the preceding article or cases which seems to require explanation or discussion. This method of exposition is no longer new, and it itself hardly requires further comment. But it is impossible to pass without notice Mr. Scrutton's excellent application of it. The terms in which the various articles are expressed render them admirable models of simple, clear, and concise drafting. He has, moreover, avoided the besetting sin of those who compile digests, the tendency to complicate the statement of main rules by qualifications and exceptions introduced into the same sentence or paragraph. This fault has been avoided with singular and uniform skill in this work, with the result that the statement of the law proceeds in a natural and convenient order, which the reader can follow with great ease. The exemplifying cases are stated with admirable brevity so as to bring the important point into relief, a brevity which is partly aided by the device of indicating the relations to each other of the several parties to the transaction by the constant employment of the same letters for the same persons respectively (as C. for charterer, A. for shipowner, &c.), according to an alphabetical key prefixed to the work.

After examining carefully very considerable portions of the book by the light of the authorities, we have no hesitation in saying that the work of stating the effect of decisions, both in the articles and in the notes which follow them, has been excellently done. The latter leave nothing to be desired in the admirable discussion they contain of the numerous questions which naturally arise at various points in the work, whether they relate to the conflict of judicial decisions, to the light to be thrown by legal history on disputed doctrines of law, or to minor points arising out of the cases cited concerning either commercial practice or the law relating to it.

The work is concluded by four Appendices, containing forms of charter-parties and bills of lading used in some of the more important lines of trade, a most useful description in detail of the practice as to loading and discharging general ships in the leading ports of Great Britain, the principal statutes affecting the contract of affreightment, and certain rules and regulations adopted by average adjusters in regard to general average and port of refuge expenses; and last of all by a good index. We shall be surprised if such a complete and well-executed work does not take a high place among standard text-books.

The Interpretation of Mercantile Agreements. By JOHN DENNISTOUN WOOD. London: Stevens & Sons. 1886. La. 8vo. xlii and 390 pp.

'OUGHT we in the case of an instrument like an English policy of insurance or a charterparty to apply the rules of construction which are applicable to other instruments? Anything more informal, inartistic, or ungrammatical than those policies or charterparties cannot be found, and until recently whenever a point arose as to their meaning, our judges almost invariably took the opinion of a jury upon the question. They did not merely take evidence of custom, they asked juries what their view of the contract was. . . [1].' Accepting this view it is impossible for us to approve of the scope of this work. There is difficulty enough in reducing to some sort of method the rules applied in the interpretation of statutes or of deeds; there is much greater difficulty and great inconvenience in attempting to do the same for mercantile instruments. Of the decisions on such documents only a portion can be considered as relating strictly to construction. Implied terms and conditions, especially, may generally be treated either as bearing on the construction of the instrument or simply as defining mercantile usage. And it is inevitable in any work conceived on the plan adopted in this book that a great body of such implied obligations must be left unstated. This means that owing to the peculiar standpoint taken, only a portion of the incidents of the commercial transactions which the book deals with will be presented. The author himself seems to have been occasionally half-conscious of the inconvenience attaching to a strict execution of his plan, as e.g. when he introduces a chapter (chap. 2) on cases within the Statute of Frauds, &c., and the appendix to chap. 2 of Book IV, on the effect of fraud in certain cases.

The work is divided into four books, which deal respectively with Written Mercantile Agreements generally, Written Agreements for the sale of goods, Charterparties and Bills of Lading, and Marine Policies. It is in the form of a digest of which the articles are generally followed by notes, in many cases very elaborate, commenting on the rule previously stated or illustrating it from the facts of the case or cases on which it has been founded.

We think the author has paid a somewhat undeserved compliment to the Legislature in taking for the model of his articles the language even of a 'well-drawn modern statute.' Well-drawn modern statutes are much too apt to depart entirely from simple and concise modes of expression, and to obscure that which should be plain by overloading the same section with complicated reservations and modifications. Unfortunately Mr. Wood is rather too apt to fall into the same error. It is fair however to say that the work gives evidence of having been prepared with the greatest industry and care; the statement of the law so far as we have tested it appears to be correct; doubtful points are ably and fully discussed; and lastly, the appendix contains useful lists, (1) of words and expressions used in mercantile instruments which have been the subject-matter of judicial decision or in works of authority, and (2) of mercantile usages which have been proved or admitted, including words and expressions having a peculiar meaning in particular trades.

Railway Accident Law. By CHRISTOPHER STUART PATTERSON. Philadelphia: T. & J. W. Johnson & Co. 1886. 8vo. cix and 542 pp.

THE application of continuous brakes must have made much less way in the United States than in this country, if it can be worth an author's

[1] Per Lord Esher M. R. in *Stewart* v. *Merchants' Marine Insurance Co.*, 16 Q. B. D., p. 627.

while to compile such a volume as that before us, devoted exclusively to injuries to the person caused by railway accidents. Assuming, however, the constant occurrence of litigation arising out of such accidents, what are the special requirements in the way of books of the practitioner engaged in that class of cases? In the department of facts, if negligence in regard to the construction of machinery or appliances were often in issue, acquaintance with works on mechanics would be invaluable; and in the frequently puzzling class of cases of alleged nervous injury without apparent lesion, a study of the few special books devoted to that subject would be of great use in dealing with medical evidence. In the way of law alone, besides the general principles of the law of negligence, there are a number of cases (as e. g. those as to level crossings, whistling, &c.) which establish certain *media axiomata* so to speak in the matter of the responsibility of railway companies, and these the practitioner must be familiar with. The book before us, however, has no concern with the matters of fact, medical or mechanical, above referred to; nor is it confined to the *media axiomata*. It may be described as a treatise on the law of negligence, and other wrongs causing injuries, with special reference to railway accidents. It is divided into four books, dealing respectively with the general nature of the railway's liability, the persons for whose acts or omissions the railway is liable, the persons for injuries to whom the railway is liable, and the remedy. The author, of course, does not confine himself to decisions relating to railways, inasmuch as there is nothing special in the nature of the legal liability of a railway company for negligence, but makes use of the host of authorities on negligence which deal with accidents in every department of life, just as he would have had to do had his work been confined to accidents from four-wheel cabs or trap-doors. It seems to us that the principle of such a text-book does not deserve encouragement. In so far as there is, if indeed there is, any sort of peculiarity in the application of the law of negligence to railways, it is one the appropriate place of which is in a work on Negligence; it has no such speciality and importance as to merit independent treatment, and the attempt to so deal with it simply produces, as in this case, a work on the main subject, modified and arranged specially for the point of view from which it was written.

There does not appear to be anything in the author's discussion of principles specially meriting attention; but the work is well-arranged in books, chapters and sections, and deals with almost every conceivable mode of accident and corresponding liability; the author's language is lucid and his discussion of the matters of fact related to his subject is clear and sensible; and he has spared no pains to collect in the notes all the cases bearing upon it.

Order from Chaos. A Treatise on Land-Tenure. By W. Pilling. London: Chapman & Hall, Limited. 1886. 8vo. iv and 199 pp.

The author of this book has undertaken to codify and amend the land-laws of England and Ireland. His qualifications for the task are peculiar; so much a very few extracts will suffice to show. At p. 5 Mr. Pilling takes objection to the law 'which enacts that the land of any person dying intestate shall not be divisible among many heirs, but shall be inherited intact by the nearest of kin.' At p. 8 he proposes to enact that 'landed estate of any kind shall be divisible among or be saleable for the common benefit of all the heirs of any person dying intestate.' Cap.

1. sec. 8 of the draft Code runs as follows: 'Manorial rights, and all liens upon land, or upon the produce of land, derived from and dependent upon such rights, are hereby abolished. Such other dues and privileges as are held by manorial title shall alone continue in force as have been and are now recognised and enjoyed as established rights.' An eminent politician was recently heard to remark that our land-laws would never be set right until they were taken out of the hands of the lawyers. When the power of the lawyers has been broken, Mr. Pilling and his draft Code will certainly come to the front. In the meantime, he must learn to labour and to wait. As we have before had to observe, jurisprudence in general may be the gift of fortune, but the law of real property certainly does not come by nature.

Land in Fetters: the History and Policy of the Laws restraining the Alienation and Settlement of Land. By T. E. Scrutton. Cambridge: University Press. 1886. 8vo. ix and 162 pp.

This is the Essay to which the Yorke Prize for 1885 was awarded by the adjudicators, Mr. Arthur Cohen and Mr. Romer. In spite of the somewhat sensational title which the author has chosen to prefix to it, he may fairly be congratulated, not only on the good fortune which has attended his labours, but on the solid merits of his treatise. His Essay may be specially recommended to students, as containing a readable introduction to the history of real property law, and also as affording an example of the methods by which that law may be most effectively studied. Mr. Scrutton has made good use of previous works on the same subject; but he uses his books independently, with constant reference to the original authorities; and he is not afraid to differ even from eminent writers on just occasion. Here and there he makes statements which are a little wanting in precision. At p. 114 for example, the statement 'Neither at common law can a fee simple be granted determinable on a particular event,' is at least doubtful, as Mr. Scrutton may see if he will refer to chap. xvii of Mr. Challis's work on the Law of Real Property. But it is fair to say that Mr. Scrutton's statements are, as a general rule, very accurate—remarkably so when we consider that he has to cover the whole history of England, from the Mark (if there ever was a Mark in England) to the Settled Land Act. In his concluding chapter, he discusses the policy of the present law of settlement, and argues in favour of the abolition of all estates in land except estates in fee simple.

Éléments du droit des gens moderne européen. Par Léopold de Neumann. Traduit de l'Allemand par M. A. de Riedmatten. Paris: Rousseau. 1886. 332 pp.

This is a translation of the third edition of an elementary book of the eminent Viennese Professor of International Law.

Professor Neumann, unlike most German writers, is an enemy of notes, but again, unlike most enemies of notes, he is a man of facts. He therefore squeezes his facts into the text as well as he can without overburdening it, and the notes are left free for the translator who therein supplies apt instances afforded by French law.

As an elementary work, few exist which are more interesting than Professor Neumann's, and his familiarity with the events of his time as

an actor and a teacher enables him to speak with authority and experience of all departments of the wide subject he deals with.

The translator, barring printers' errors, has done his work creditably, and has thus placed within reach of those who do not read German easily a little work which is indispensable to the literature of the subject.

There is no index.

Droit Public International Maritime. Par CARLOS TESTA. Traduction du portugais par AD. BOUTIRON. Paris: Pedone-Lauriel. 1886. 347 pp.

M. TESTA's work is a text-book of maritime international law for the use more especially of naval officers, secretaries of legation, and consuls who are called upon to give practical application to the rules of international comity in foreign ports and on the high seas.

It is divided into four sections, the first treating of the history of the subject, the second of general principles, the third of international relations in time of peace, and the fourth of international relations in time of war.

M. Testa is a professor at the Naval School of Lisbon, and his book is written for a country destined to play the part of a neutral almost exclusively. One of the questions of most interest in his book is therefore that of contraband of war. He limits the right to declare coal contraband of war to the case in which 'its destination is a point where there are no commercial or industrial establishments, and where only belligerent naval forces are stationed, are in want of this indispensable motive element and are unable to procure it on the spot' (p. 210). It seems unquestionable, he observes, that the circumstances of the destination may give this article the character of contraband. He protests against generalising certain articles of common use in time of war and in time of peace as contraband on simple notice. 'If,' he says, 'in troubled times and in forgetfulness of all ideas of justice towards neutrals, states have thus acted, such a practice can only be considered as a perversion of the general principles of the rights of neutrals' (p. 211).

M. Testa's distinctions in the case of coal and his objection to generally declaring victuals of any kind contraband represent a fair neutral's view of the subject.

The translator has added notes of a practical character drawn from recent events, which enhance the value of the work.

A Concise View of the Law of Landlord and Tenant, including the practice in Ejectment. Third Edition. By J. H. REDMAN and G. E. LYON. London: Reeves and Turner. 1886. 8vo. xliv and 592 pp.

THIS is one of a class of books which may be written on some few subjects which are of constant importance. It is a practical compendium rather than 'a concise view' of the law of landlord and tenant. The sole object of the authors is to put as much material into as small a space as possible, and they undoubtedly succeed. It has deservedly reached its third edition, for it has the great merit of giving authorities for nearly every dictum, a practice which is often neglected by those who write 'compendious' works, and it has the further merit of giving in most cases but one or two authorities, and thus supplying a single sufficient case for the practitioner to rely upon. The work is brought down to the very latest date possible, for the case of *Clarke*

v. *The Millwall Dock Co.*, L. R. 17 Q. B. D. 494, which is the most authoritative decision of recent date on the subject of taking the goods of a third person for rent owing by a tenant to a landlord, is noticed. But the authors' remarks on it scarcely however point out the main ground of the judgment, namely the actual non-delivery of the ship to the tenant of the dock. Indeed the dictum of Lord Esher as to constructive delivery, which is alone noticed by the authors, was altogether *obiter*. But when the rest of the book is accurate, an oversight in speaking of a judgment reported as a work goes through the press may well be excused.

Law and Practice in Bankruptcy. Comprising the Bankruptcy Act, 1883, *the Bankruptcy Rules*, 1886, *the Debtors' Acts*, 1869, 1878, *and the Bills of Sale Acts*, 1878 *and* 1882. Fourth Edition. By R. Vaughan Williams, W. Vaughan Williams, and Edward William Hansell. London: Stevens & Sons; H. Sweet & Sons. 1886. Royal 8vo. lxiv and 735 pp.

This fourth edition of a well-known and useful work has been rendered necessary by the issue of the New Bankruptcy Rules, 1886. As these came into operation as recently as the 25th October last, it speaks much for the diligence of the compilers that the book has been published so early and without apparent marks of haste.

We have tested the work in many places, and we have not as a rule found it wanting. We are, however, surprised not to find in it any reference to *Dixon* v. *Brown*, 32 Ch. D. 597. This is an important case in the Chancery Division, showing that monies paid to a trustee in Bankruptcy under a mistake in law must be refunded, and therein following earlier though recent decisions in Bankruptcy. On the whole, however, the volume is brought quite up to date, and we can recommend it as a safe and useful guide to practitioners.

The Investment of Trust Funds. By Edward Arundel Geare. London: Stevens & Sons. 1886. 8vo. xvi and 244 pp.

Recent events have brought the subject of this treatise into somewhat painful prominence, and it will probably be found of much general use. Few cases have created a greater flutter in the breasts of trustees and of their legal advisers than *Fry* v. *Tapson* (22 Ch. D. 727; 9 App. Ca. 1; *op. cit.*, pp. 30–41), where Kay J. emphasised what is known as the one-half rule as to trust investments, and laid down certain other severe though perhaps salutary rules. One effect of the decision is said to be a check to the speculative builder in obtaining loans, a result which perhaps is not without a good side.

We must add that we are surprised to find no mention of laches or acquiescence or of the Statutes of Limitation. Lapse of time is of some avail in curing even breaches of trust. It seems also misleading to say without qualification that India Four per Cent. Stock is the investment usually adopted by the Court (*op. cit.*, p. 73). This was so several years ago, but now this Stock is too near repayment at par to make it a suitable investment at a premium.

The Powers, Duties, and Liabilities of Executive Officers. By A. W. Chaster. London: William Clowes & Sons, Limited. 1886. 8vo. 305 pp.

Mr. A. W. Chaster is alarmed for the liberty of the British subject, whom he conceives to be in danger of losing his rights against sheriffs,

policemen, tax-gatherers, inspectors, and all the race of persons whose business it is to enforce the commands of the law—especially those commands whereby a subject is bidden not to abstain from doing but to do something. In order the better to protect him from this peril Mr. Chaster explains in his book what the mutual duties of the public and of the 'executive' really are. His method is, in cases of statutory provision, to cite the words of the statute with very little in the way of explanation or arrangement. Where the subject has been the matter of judicial decision he states very briefly what he takes to be the result. Mr. Chaster has evidently taken great pains with his book, and this makes it likely that his conclusions are in the main accurate. At the same time it does not much help the general public to give them the words of statutes. For the profession the volume is more likely to be of use as a sort of intermediate index than in any other way.

Les Codes Néerlandais. Traduits par GUSTAVE TRIPELS. Maestricht: J. Germain et C^ie^. 1886. 737 pp.

THE Dutch language, though bearing such strong resemblance to our own, is not easily read by Englishmen on slight acquaintance. Those who require to consult the Dutch codes will therefore be grateful to Mr. Tripels for having brought them within easier reach by translating them into French.

The Code Napoléon which was introduced into Holland in 1811 remained in force until 1838, when new revised codes come into operation. The French codes however remained the basis, and are so still except as regards criminal legislation. The Penal code of Holland, in fact, is the most recent effort which has become law to bring the entire criminal law of a country into harmony with the views of modern criminalists.

Mr. Tripels comprises in his book the constitution and fundamental and administrative laws, the civil and commercial codes, the codes of civil and criminal procedure and the penal code. As far as we can judge he has done his work with the care befitting the subject.

A Short History of the Military and Naval Services of the Inns of Court, &c. By F. C. NORTON. London: Wm. Clowes & Sons, Limited. 1886. 8vo. 16 pp.

IN this brief pamphlet Mr. Norton shows how the members of the Inns of Court have always been ready to offer their services at need for the defence of the realm and the preservation of the peace. Many documents of interest are referred to, or in some cases more or less fully set out. The story ends with the formation of the existing I. C. R. V., and no reference is made to the present critical state of the corps, which unhappily is already matter of public knowledge. It is greatly to be hoped that the men of the Inns of Court will not deem it too great a burden to maintain an honourable tradition vouched by such an ancestry as Mr. Norton has here set forth. If any young barrister or student thinks he will be a worse lawyer or man of business for learning the discipline of arms in the best of legal company, the same doth greatly err.

Revue de la Réforme judiciaire. Publiée par M. VICTOR JEANVROT. Paris: Chevalier-Maresco et C^ie^. 1886.

THE second volume of this periodical is not inferior to the first, and it is in one particular superior to it, viz. in the possession of an index.

The articles have a varied character, and the notes which form an important part of the publication are carefully compiled.

We have also received:—

The Statutes of Practical Utility, &c., 1886 (*annual continuation of Chitty's Statutes*). By J. M. LELY. Vol. II. Part I. London: H. Sweet & Sons and Stevens & Sons. Large 8vo. viii and 108 pp. This useful work needs no commendation: but in the note on the Marriage Act we read with surprise that under 4 Geo. IV. c. 76, 'it was felony, to be punished by 14 years' penal servitude, to solemnize a marriage between 8 a.m. and 12 in the forenoon, except by special licence from the Archbishop of Canterbury; and it is still felony, so to be punished, to solemnize a marriage between 8 a.m. and 3 p.m. except by such licence.' There would be a great many unpunished felonies if this were literally correct. Another 'except' seems to have dropped out.

A Sketch of the Law of Tort for the Bar and Solicitors' Final Examinations. By JOSEPH A. SHEARWOOD. London: Stevens & Sons. 1886. 8vo. xii and 88 pp. The design of this little book is better than its execution. In arrangement it is fairly clear, and its conciseness is laudable: but many things are too positively stated, and many statements not incorrect in themselves are put in a way likely to mislead students. The statements of cases are too short to be of any value, and the want of continuous reference, not merely to the regular reports but to any one set of reports, is a grave blemish. We note one singularly bad slip of pen or press, where liquidated damages are described as '*not* fixed in amount' (p. 18).

A Treatise on the Law of Estoppel and its Application in Practice. By MELVILLE M. BIGELOW, Ph.D. Fourth Edition. Boston: Little, Brown, & Co. 1886. Large 8vo. lvii and 765 pp. The date of the first edition was 1872. Four editions of a book on this scale in half a generation speak for themselves, and the solidity of Mr. Bigelow's work is well known otherwise to readers of this REVIEW. We may perhaps make this edition an excuse in a future number for the short discussion of one or more of the points raised by its many-sided subject.

A Manual on the Law affecting Voters' Lists . . . in Ontario. Second Edition. xxii and 260 pp. *The Canadian Franchise Act, with notes of decisions.* 8vo. 220 pp. *Supplement to the Canadian Franchise Act, 1885, containing the Amending Act of* 1886. Toronto: 1886. 8vo. 52 pp. By THOMAS HODGINS, Q.C. We must leave the criticism of these little books to Canadian practitioners: but they look workmanlike, and Mr. Hodgins has studied the history of the parliamentary franchise in England. In the 'Manual' there is an interesting note where much authority is collected on the abilities and disabilities of women with regard to political offices and franchises.

Accidents de Travail: Projet d'une proposition de loi. Par CH. SAINCTELETTE. Bruxelles. 1886. 8vo. 73 pp. + 1 leaf. In this tract M. Sainctelette forcibly restates his ingenious but somewhat peculiar theory of employers' responsibility to their workmen for injuries received in the course of employment. The argument would lose nothing in force and might gain much in persuasiveness if M. Sainctelette were to show a little more consideration for the judges and writers who have the misfortune to differ from him.

NOTES.

THE question raised by Mr. Thornhill in his article on 'Spring and Autumn Assizes' in the last number of the Law Quarterly Review is more important than he has perhaps considered. His scheme has for its object the creation of a body of inferior Judges who are to try all criminal cases, except capital ones and some few others which the inferior Judge (or Commissioner) is to reserve for one of the superior Judges.

This raises a question of, as it seems to me, vast moment in law and politics, whether the administration of criminal justice is of first-class or second-class importance.

The tendency for a long time in this country has been to treat criminal trials as matter which anybody could handle, which could be left to a jury under the guidance of a layman or of a barrister of inferior training and standing, and that without appeal; while questions involving property of no great amount were reserved for the handling of a Judge of the Superior Court, with one, two, or three appeals, either in the form of motions for new trial or otherwise.

I submit that this tendency is all wrong, that the 'intelligent foreigner' who wished to gird at our money-worshipping instincts could not choose a better topic for his censure, and that it is not consistent with our modern democratic principle of the independence and dignity of each separate citizen.

The late Lord Justice James, commenting upon the complexity of our civil procedure, once observed to me that Sir Thomas Henry, at Bow Street, disposed with a much simpler procedure of cases upon the whole vastly more important than the ordinary run of cases, even before the Court of Appeal.

I have often thought what my feelings would be if I found myself indicted before Quarter Sessions (whether county or borough) on some serious charge, involving perhaps or accompanied by religious, political or social prejudice, where the only guide to the jury was a county gentleman, very likely sharing the prejudices of the neighbourhood, or any barrister of not more than five years' standing [for this is the only qualification of a deputy recorder], and of the bitterness with which I as a lawyer should bring home to myself the knowledge that from his misdirection or incapable direction and the jury's temporary wrong-headedness there was no new trial, no appeal except upon such point of law as the presiding judge might himself be willing to reserve for me [and the reservation is by no means always made], while if the matter of the litigation had been, *not* my imprisonment for years and professional ruin, but the question whether I owed my tailor £25, a matter of comparatively no importance, I might, if my cause were just, have new trials *ad infinitum* and appeals to the House of Lords.

No doubt the proposed institution of an appeal, contained in the Criminal Codes recently submitted to Parliament, is a step in the right direction; but on the other hand we have 'Bills for enlarging the jurisdiction of Quarter Sessions,' and an outcry against the four yearly assizes.

No doubt by a succession of anomalous acts of legislation the Common Council of the City of London may elect any barrister to be a Judge in matter of life and death for all the Home Counties, but this is one of the reasons why Metropolitan Municipal Reform is as necessary as it is.

It may be said that criminal cases being as a rule badly paid do not attract as a rule the higher class of barristers. Answer: The more reason we should have the higher class of Judge. The facts are often short and simple. Answer: They will not take up much of the Judge's time. But Sir James Stephen has recently expressed an opinion that *uneducated prisoners* not unfrequently fail to bring out their defence. Moreover, even in the simpler cases there is a reason for the presence of the Judge wherever the sentence is discretionary. Those who know how marvellously unequal in severity are the sentences passed respectively at the Assizes, at Borough, and at County, Quarter Sessions will hardly need to be reminded of this reason.

Upon the whole I submit that whatever legislation may do in remitting small civil causes to inferior and local jurisdictions, criminal trials involving grave penalties should form part of the especial province of the superior Judge.

WALTER G. F. PHILLIMORE.

ST. LOUIS, MO.
Nov. 3, 1886.

To the Editor of the 'Law Quarterly Review.'

DEAR SIR,—In the Notes of the October number, at page 529, while discussing *Lee* v. *Abdy*, 17 Q. B. D. 309, you say, 'The general principle which lies at the bottom of at least half the rules as to the conflict of laws is, that a right duly acquired under the law of one country must be enforced in other countries in accordance with that law, and that a right which, if acquired at all, must be acquired under the law of a given country, is not enforceable in any country if the right is invalid, i.e. not recognized by the law of the country where, if at all, it is acquired.'

Allow me to ask why you limit to '*half* the rules' a statement which seems to me to describe better than any other the entire matter of private international law, and which certainly is a great improvement over the old fiction of foreign laws enforced where they are not laws by a supposed comity of nations. If the other half of this law be thought to consist of rights acquired under English law, but measured by rules of a foreign law, as stated below upon the same page, I must venture a modest dissent from such a limitation of what I believe to be a true doctrine. You say yourself that the right in these cases is an English, and not a foreign right. It cannot then be a part of private international law, or constitute the lacking half (or any other fraction) of that law. Does the reference in an English contract or document to the rules of any foreign society properly make the interpretation of such contract part of international law? If a domiciled Englishman were to provide by a will made in England, according to English forms, that his money should be divided according to the Code Napoléon, would the reference to the foreign law by the arbitrary will of the disposing party take the case out of the proper field of the English law any more than if he had referred in the same way to the rules of Plato's 'Republic' or of Cicero's 'De Legibus,' or for that matter of Sir Thomas More's 'Utopia'? Take the case of *Lee* v. *Abdy* itself as an illustration:—An English policy of assurance held by a resident of the Cape Colony is by him assigned to *A*, another resident and domiciled there. After the death of the assured, *A* sues the company and is met with the defence that the assignment was utterly void by the law of the Colony in which it was made.

Is this a case of an English right submitted for interpretation to a foreign law by the arbitrary direction of an individual? Is it not rather a right arising, if at all, under a foreign law, and to be measured in other countries in accordance with that law? The fact that the original right was English does not alter the case any more than if the litigation were about the ownership of an English horse, sent for the time to the Cape Colony and there sold by *N* to *A*. *A*'s right to the policy, if any, has its origin in the Cape Colony, and is to be measured by the rules of law in force there, just as truly as the rights of *N*, the original policy holder, originated in England, and were to be measured by the English law. We are familiar with cases of this kind in the law of negotiable paper, made in one country, accepted in another, and perhaps endorsed in a third, the rights of the holder against each party being measured by the law of the country in which each right originated.

It must not be overlooked that every assignment or transfer of a right is a new right, with a *lex loci* of its own, as truly as on the other hand the vast majority of new private rights commonly recognized as such are in truth only modifications and transfers of rights previously existing. Blackstone's example has led to a general disregard, in English law, of the distinction between original and derivative rights, and has thus, perhaps, led us to overlook the immense preponderance of the latter in modern life. If we appreciate the fact that such derivative rights are none the less new ones, governed by the *lex loci* of their own origin, it will be difficult to find any other rights to constitute the 'other half' of the subject. If a right of foreign origin is the subject-matter of *Lee* v. *Abdy*, it seems evident that the same thing is true of all the rights in private international law.

I should be glad, if it were not encroaching on space for which you have better use, to go a little further and enquire whether it is not also true within the boundaries of each municipal law. A somewhat extended experience with students has left upon my mind a strong impression that the common doctrine by which they are taught to begin with law, as the source of all rights and duties, is a great obstacle in the way of their progress. They look for a system or body of such rules and do not find them. What they do find, alike in unwritten and written law, is an immense mass of rules and decisions, defining, extending or limiting rights, and especially drawing lines of demarcation at the bounds where two or more rights meet. It is impossible to learn these rules as a system, because they are not such. They presuppose, in all cases, the rights and wrongs and duties which form the subject-matter of all law (*jus*), and it is only after learning these that the student can acquire a correct notion of the rules. The current theory of Austin (and of Blackstone) confuses him by presenting these conceptions, not in their natural order, but in one that may be termed (literally) preposterous.

I am, Sir, with much respect, and with sincere thanks for much pleasure and profit from the pages of the REVIEW,

Your obedient servant,

W. G. HAMMOND.

As the writer of the Note referred to by Mr. Hammond, I wish to make a few observations on the points raised by his letter. These remarks are not controversial. Between Mr. Hammond and myself there is little essential difference of opinion. My aim in these notes is simply to elucidate a topic of speculative interest.

1. The rules of (so-called) Private International Law—the name is an admitted but convenient misnomer—are a special portion of the law of any given country (e.g. England): they are the rules which determine two points; first, the circumstances under which English judges must in accordance with the law of England decide a given case with reference to the law, say of France; and, secondly, the circumstances under which English judges must in accordance with the law of England hold that a foreign, e.g. a French Court, has authority to determine a given matter.

It may be well, for the sake of clearness, to put aside those rules of (so-called) Private International Law which refer to questions of jurisdiction, though it is to my mind doubtful whether these rules can without some straining be treated as applications of the general principle which commands Mr. Hammond's approval. On this matter, however, I pronounce no decided opinion.

2. When English judges are called upon to determine the rights of the parties before them in reference to foreign, e.g. French law, they may be called upon by the law of England to do so for two distinct reasons. The first reason is that *A* has acquired rights against *X*, which in strictness originate under French law. *A*, a French citizen, sells goods to *X*, another French citizen, at Paris, and *X* thereby incurs a debt to *A* of 500 francs. *A* sues *X* in England, and in virtue of the contract made and broken in France, recovers £20 from *X*. It is perfectly clear that *A*'s right originates under French law, and that the extent of his right must, if justice is to be done, be determined in accordance with the law of France. Exactly the same principle applies if *X* defends himself on the ground that in fact he paid *A* at Paris. *X*'s right of defence originates under French law, and its extent and validity must be determined by English judges with reference to the law of France in regard to the transactions which do or do not constitute payment. If the only reason why English judges ever decided a case in accordance with French law were that one of the parties had acquired rights under the law of France, then the rules of Private International Law might very conveniently be summed up as rules for determining cases in which the cause of action or cause of defence had arisen out of transactions taking place wholly or in part out of England. But there is another, and in my judgment quite different reason for which English judges are sometimes called upon to determine a case with reference to the laws of France. This reason is, that though the rights of the parties originate wholly under English law, and though no part of the transactions on which their rights are based has taken place out of England, yet they have chosen to determine the limits of these rights by reference to the law of France. A good example of this ground for applying French law is given by Mr. Hammond himself. *X*, a domiciled Englishman, owning property nowhere but in England, makes a will under which he directs that his property shall be distributed among his children in accordance with the provisions of the Code Napoléon. English judges will determine the rights of the parties with reference to French law. That this is so, Mr. Hammond does not dispute. His contention, if I understand it rightly, is, that where the only reason for applying foreign law lies in the fact that one cannot carry out a person's intentions without referring to foreign law, then the case does not really fall within the domain of (so-called) Private International Law. My grounds for not assenting to this contention are two-fold. All writers on the subject of Private International Law with whose works I am acquainted do, as a matter of fact, include within their topic cases where foreign law is applied by English Courts simply because the rights of the parties cannot

be understood without reference to it. I accept Mr. Hammond's illustration, and say that the supposed application of the laws of Plato's Republic would be properly dealt with as a subject belonging to the topic miscalled Private International Law. The course moreover taken by text writers appears to me in this instance to be right. It is convenient and not illogical to include in one department all the rules for determining the circumstances under which English judges should decide a given case in reference to some foreign law. It strikes me that in his argument against this view Mr. Hammond for a moment loses hold of the fundamental principle that every case decided in an English Court is determined according to the law of England. The difference is that, in ordinary instances, English judges are ordered by the law of England to consider nothing but the ordinary rules of English law applying to transactions which take place wholly in England, and in which the parties had no view to foreign law; in exceptional instances the law of England orders that the judges shall determine the case with reference to the law of a foreign country. There appears no objection to bringing under one head all the instances in which the law of England orders the judges to apply foreign law. It is no objection to such classification that these instances are based upon two different principles.

3. I entirely agree with Mr. Hammond that the reference of the rules of Private International Law to a fiction of supposed 'comity' leads to mere confusion. Comity or politeness is not in fact the motive for determining transactions which contain a foreign element by reference to foreign law, and were it admitted that comity or politeness is the reason for applying foreign law to the determination of cases before English Courts, this admission would not guide us a step towards the determination of the only question which requires to be settled, namely what are the cases which are determinable by English Courts by reference to foreign law.

A. V. Dicey.

Harris v. *Brisco*, 17 Q. B. D. (C. A.) 504. This is one of those actions for 'maintenance' with which the public are now unpleasantly familiar. All that it decides is that the old books are right, or rather that the judges will follow the old books in laying down that such an action can be met by the plea that the defendant acted from motives of charity.

In this there is nothing to startle a lawyer. But the case will suggest some curious enquiries to laymen. Is it, for instance, desirable that a practically obsolete form of action should be revived? If the judges recall it to life, ought they not, as Justice Wills was prepared to do, remodel it so as to suit modern ideas? Is it not, above all, clear that the whole law of 'maintenance' requires revision and ought to be dealt with by the Legislature? We do not undertake off-hand to answer these questions, but they certainly require a reply. They suggest the further enquiry, which some day or other will receive consideration, whether since the judges do, and members of Parliament do not, understand the law of England, it would not be well to acknowledge and increase the indirect legislative authority of the judges.

The reference in this case to Judge Paston is interesting. He was the founder of the family that wrote the celebrated Paston Letters, and earned the title of 'The Good Judge' (Fuller's Worthies). His memory was held in such respect by the Bar, that when an action was commenced against his widow to recover certain lands no counsel could be found to undertake it.

Pearce v. *Foster*, 17 Q. B. D. (C. A.) 537, determines that merchants may dismiss a clerk on the ground that he has been speculating in 'differences' upon the Stock Exchange to the amount of many hundreds of thousands of pounds. With the decision itself no one will quarrel, and it is very well that in Lord Esher's language 'it may be understood that the moment it is made known to a master that his clerk has been gambling to anything like this extent on the Stock Exchange, that of itself will authorize any tribunal in saying that the master was justified in dismissing the servant.' But the principle laid down by Lord Esher, which is broader than the facts of the case require, may give rise to some curious enquiries. Is it mere 'gambling' which will authorize the dismissal of a servant, or must the gambling be to a large amount? Is it the master or a jury who are to decide whether the amount is sufficient to justify dismissal? Does the same principle apply to other immoral or imprudent courses of action not directly connected with the servant's employment? In considering the reply to these questions we should note that Lord Justice Lindley bases his judgment on narrower and firmer ground than that taken by Lord Esher, namely on the ground that where a clerk is called upon to advise his employers as to their investments he has no right to engage in speculations which may vitiate his impartiality as an adviser, and thus cause a conflict between his interest and his duty. The decision moreover in *Pearce* v. *Foster*, which treats dealings on the Stock Exchange as 'pure gambling speculations,' is hardly reconcilable with the spirit of such cases as *Seymour* v. *Bridge*, 14 Q. B. D. 460, *Bridger* v. *Savage*, 15 Q. B. D. (C. A.) 363, *Read* v. *Anderson*, 13 Q. B. D. 779. We do not for a moment mean to assert that any of these cases conflict with *Pearce* v. *Foster*; what we do assert is that the Courts are a little at sea in their way of looking at Stock Exchange and gaming transactions. It is well worth consideration whether it would not be better that the tribunals of the country should refuse to give any legal force whatever, either directly or indirectly, to dealings either on the Stock Exchange or on the race-course which partake of the nature of wagers.

Ex parte Gilchrist, 17 Q. B. D. (C. A.) 521, is curious in two respects. It has driven the Court of Appeal to attempt, without great success, to give something like a definition of that very ambiguous term 'property.' It further exhibits in a strong light the very anomalous position in which the Married Women's Property Act, 1882, places a married woman. One difficulty after another is certain to arise until the spirit of modern legislation with regard to married women is logically carried out, and a married woman is placed, as regards her property, in the position of a *feme sole*.

Thomas v. *The Duchess of Hamilton*, 17 Q. B. D. (C. A.) 592, illustrates a point well known to persons who have studied the rules of the law of England with regard to the conflict of laws, namely that rules of practice constantly give rise to questions involving curiously abstract legal principles. The actual matter under discussion in the case was whether a judge has, under Rules of Court, 1883, Order XL. r. 1, discretion as to allowing a writ to issue out of the jurisdiction, and the case, in manifest accordance with the terms of the rule, decides that he does possess such discretion. But incidentally the case raises, or nearly raises, the curious enquiry, which is by no means easy to answer, where it is that a contract is broken when *X*, a foreigner residing abroad, orders goods of *A*, an English jeweller, and does

not pay for them. It is certainly odd, though perhaps not really inconvenient, that a point admitting of a good deal of speculative argument should be left to the decision of a judge at Chambers.

Of all the cases published in the quarter's Law Reports, the most important in a mercantile point of view is *Blackburn* v. *Vigors*, 17 Q. B. D. (C. A.) 553, which we commented upon shortly in our October number.

It follows *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511, and decides that a marine policy of insurance is vitiated through the concealment from the assured whilst effecting the insurance of a material fact by a broker employed by him to effect another insurance, although he is not the broker through whom the policy of insurance in question is effected, and although the assured is innocent of all fraud. The broad principle laid down by the case is in short nothing less than this. Any person who wishes to effect a policy of marine insurance must communicate to the underwriters not only every material fact known to him, but also every material fact known to any agent (or, as we read the case, to any other person) who ought to have communicated it to the assured. If this is not done the insurance is void. The case, in short, affirms in the broadest terms the principle that the knowledge of an agent (and perhaps even of persons who are not strictly agents) is the knowledge of the principal.

We are anxious to point out that the decision in *Blackburn* v. *Vigors* does really involve, as Lord Esher asserts it does, the principle that the knowledge of the agent is the knowledge of the principal. The judgment of the Court may be right. Where judges so eminent as Lord Esher and Lord Justice Lindley differ, it is wisest to suspend one's own opinion and to wait for the result of the almost certain appeal to the House of Lords. But we submit that nothing is gained by concealing the breadth of the principle necessarily involved in what will undoubtedly be a leading case.

Two remarks incidentally suggested by *Blackburn* v. *Vigors* are worth making.

First, Lord Esher is certainly right in insisting upon the great caution with which legal maxims should be applied. A proverb attains its currency by being an exaggeration of the truth; it can never be safely used as the premiss of an argument, and what is true of all kinds of proverbial wisdom is emphatically true of legal saws.

Secondly, it admits of grave doubt whether the judges act wisely when they add terms to a contract. It is one thing to see that a contract is not vitiated by fraud; this is the function of the judges. It is another thing to add terms to a contract which may hinder fraud; this is the function of the contracting parties. If it be well that the underwriters to a policy of insurance should insist upon communication not only of all the assured knows but of all that the assured ought to have been told by other people, then it would apparently be well that underwriters should give notice on the face of the policy of the information which they demand. The decision in *Blackburn* v. *Vigors* may be in accordance with legal principle, but we think it very doubtful whether it does not violate the common-sense maxim that it is better that men should contract for themselves than that their contracts should be made for them by the Courts.

Laymen will pay more attention to *Macdougall* v. *Knight*, 17 Q. B. D. (C. A.) 636, than to most cases in the Law Reports, for it deals with libel, and the public are at the moment morbidly interested in the subject of

defamation. The point decided in it is one as to which a lawyer would feel little doubt, namely that a report of a judgment published by *X bonâ fide* and without malice is privileged, even though the judgment contains reflections on *A*'s character, and the report is not accompanied by any account of the evidence given at the trial. The same point has been twice decided by the Irish Courts, *Cosgrave* v. *Trade Auxiliary Co.* (8 Ir. C. L. 349) and *M'Nally* v. *Oldham* (16 Ir. C. L. R. 298). The case, however, gives occasion to one or two observations.

(1) The law of libel and slander is as good an example as can be found of judge-made law. It is in the main the creation of the judges, and has gradually developed itself in accordance with the needs of the time and prevailing views of public policy.

(2) The particular principle to which *Macdougall* v. *Knight*, gives so to speak, the final development is that it is for the 'interest of the community that no restriction should be placed on the publication of what judges say in the course of proceedings in courts of justice.' The principle is obviously sound. The result of *Macdougall* v. *Knight* is to bring a new combination of circumstances distinctly within the limits of the general rule.

(3) The law of libel is not only a very curious, but, as it now exists, a singularly favourable specimen of judicial legislation. The law as to defamation can never, though this is often forgotten, be considered more than a compromise between two opposite evils. It is an evil that a person should be injured even by truthful statements as to his character. It is a still greater evil that freedom of speech and freedom of discussion, on which ultimately depends the ascertainment of truth, should be checked. All the law can do is to steer as nearly as may be between these two opposite perils. The law of England accomplishes this result with as much success as is attainable in human affairs. Discussion is substantially free, and character is protected. It is, moreover, a great merit in the law, that when periods arise in which freedom of speech is perilous, juries can draw tighter the operation of the law of libel. It is a further and immense merit that the law of England hardly concedes any special privilege to writers in the press. It is impossible to conceive a class of persons who have less claim to any special freedom of speech than writers whose primary object must from the nature of things be to make statements which, because they arouse attention, will promote the sale of the newspaper in which they appear. Sensational statements must in general be inaccurate and must often be untrue statements. The prophets of the press are, it must always be remembered, prophets who make a gain by circulating their predictions.

Concha v. *Concha*, 11 App. Cas. 541, is a case of considerable importance to everyone interested in decisions regarding the conflict of laws, and we may probably have to comment at length upon it at some future time. The main point which it decides is that a decree of the Court of Probate is not conclusive as to any fact not necessary to the decree, and that therefore the decree of the Court as to the validity of a will is not conclusive *in rem*, in reference to the testator's domicil.

Woodward v. *Goulstone*, 11 App. Cas. 469, sets a limit on the doctrine supported by *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, that a will may be propounded for probate upon parol evidence alone. It is perfectly clear

from *Woodward* v. *Goulstone* that the House of Lords will not let a will be proved by oral evidence unless there is the very strongest reason for believing that the Court has before it the full intentions of the testator. It may further be suspected that the House looks with some suspicion on the doctrine contained in *Sugden* v. *Lord St. Leonards*.

The ancient British boat recently discovered on the banks of the river Ancholme, Lincolnshire, has given rise to some curious questions of law (*Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562). The boat in question, which was stated to be 2000 years old, was dug up by lessees of the land in which it was found. The lease contained a reservation of minerals: it contained also a license to the lessees to excavate to a depth of fifteen feet, but there was no provision as to how the spoil was to be disposed of. The first question was what this curious relic at the time of its discovery was. Was it a mineral, or was it a chattel, or was it something fixed to the soil? It was not fossilized or petrified, and wide as is the definition of minerals given in *Hext* v. *Gill* (L. R. 7 Ch. 699), comprehending 'every substance which can be got from underneath the earth for the purpose of profit,' the Court held that it could not include a work of art and man's device like a boat, merely because it was embedded in the soil, any more than it would a pot of ancient coins or a Roman lamp. It was a chattel when disinterred, but (*semble*) not at the time of discovery. It seemed more properly to come under the category *quicquid fixatur solo*; and none the less that it was fixed where it was found in the ooze of the river by the operation of natural causes. Under whichever of these descriptions the boat came, the lessor was at the date of the lease entitled to possession of it as against all the world, including the original owner, who must be taken to have abandoned his property. Did the lease confer then any title to it on the lessee? *Prima facie* a lease is only a contract for possession of land, but *Herlakenden's Case* (4 Rep. 62 a) lays it down that 'dotards without any timber in them, if blown down by accident, belong to the lessee;' and it was argued that the boat was nothing but a hollow tree or dotard. But it was clearly something more. If it was a mineral, it was the property of the lessor under the reservation in the lease. If it was a chattel, the lessee could not acquire any title as against the lessor by the mere finding of it. The most plausible argument for the lessee's title was founded on the license to excavate and the correlative duty of removing the spoil. If the burden of this was cast upon the lessee without any provision as to disposal, the benefit of what was found ought to go with it: but the Court held otherwise. 'The implied permission,' said Chitty J., 'to remove and dispose of the spoil ought to extend to what the parties might fairly be deemed to have contemplated would be found in making the excavations, but no further.' The existence of the venerable relic was not known to the parties, and could not have been contemplated. The decision seems in harmony with the general current of authorities in the Common Law as to possessory rights, though in Roman law, classical or modern, it would probably have gone otherwise.

An executor, who pays away a legacy to the wrong person on a *bonâ fide* but mistaken construction of the will, is liable not only to pay the principal over again, but to pay it with interest: so Chitty J. has decided in *In re Hulkes, Powell* v. *Hulkes* (33 Ch. D. 522). In *Saltmarsh* v. *Barrett* (31 Beav. 349) Sir J. Romilly refused in such a case to hold the executor liable

for interest, but *Saltmarsh* v. *Barrett* is opposed to the current of authority. The principle upon which the Court has gone, as stated by Lord Hatherley in *Middleton* v. *Chichester* (L. R. 6 Ch. 152), is to treat a trustee who has received trust moneys and misapplied them, as having the moneys in his possession until he has properly discharged himself, and this he cannot of course do by showing that he has paid them to a wrong person. This fiction of equity, that the moneys still remain in the trustee's possession, being once established, there is no ground for drawing any distinction between the payment of principal and the payment of interest, harshly as the rule may sometimes operate. The executor's only security, if a will is at all obscure, is to take the opinion of the Court.

In *Caird* v. *Moss* (33 Ch. D. 22) a plaintiff in the Palatine Court obtained judgment for the payment of a sum of money under an agreement and the money was paid. The defendant then commenced an action to rectify the agreement (though he might have counterclaimed for rectification in the Palatine Court), and Kay J. held that he was entitled to do so. The Court of Appeal reversed the decision. 'It is important,' said Lindley L.J., 'to see what the object of rectification is. If nothing remains to be done under an agreement, I think there is no ground for rectifying it. Here there is absolutely nothing to be done under it.' The case of *Davis* v. *Hedges* (L. R. 6 Q. B. 687) was, as the Court pointed out, quite different. There the defendant had a set-off but did not plead it, and this was held not to prevent his enforcing his right by a separate action.

The rule that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with is illustrated in the case of *Jackson* v. *Northampton Street Tramways Co.* (55 L. T. R. 91). The plaintiff in that case had taken a lease of advertisement spaces on the cars of a tramway company, the lease containing a condition for forfeiture on non-payment of any moneys due under the agreement for thirty days after demand in writing. The company made a demand for rent as due on the 1st April which was not due until the 7th, and on default declared a forfeiture. Stirling J. held, on the authority of *Johnson* v. *Lyttle's Iron Agency* (5 Ch. D. 687), that the forfeiture was bad. In such a case, as James L.J. observed, a very little inaccuracy is as fatal as the greatest.

The case of *Midland Railway Co.* v. *Miles* (33 Ch. D. 632) raised a somewhat curious question as to the implication of a way of necessity. *M* was the owner of a triangular piece of land enclosed by the lines of a railway company. The triangle contained surface minerals, and to obtain access to these *M* claimed a way of necessity over the railway company's line. At the time when the company had taken *M*'s land (the company also bought the minerals) *M* owned land on the other side of the line, but this he had since sold. Under these circumstances the Court held that *M* having had at the date of the sale to the company a right to construct communications from the severed land to the triangle, a re-grant by the company of a way of necessity could not be implied in the conveyance by *M* to the company. The company in the present case had bought the minerals: if a company when it takes land does not buy the minerals, the landowner is entitled to work them from the surface, if such is the usual manner of working (e. g. in

the case of clay), though such working interferes with the uses of the land for the purposes of the company's undertaking.

In *Kirk & Randall* v. *East & West India Dock Co.* (55 L. T. R. 245) the Court of Appeal affirmed the principle that an arbitrator cannot be interfered with if he does not exceed his jurisdiction, unless indeed he is guilty of moral misconduct. An arbitrator is the judge whom the parties have chosen, and by his decision, whether of fact or law, they are bound. To interfere with an arbitrator while the arbitration is proceeding on the ground of his misreception of evidence, as the Court was asked to do in the present instance, would be fatal to the whole system of arbitration.

In re Hardwick, Ex parte Hubbard (17 Q. B. D. 690) the Court of Appeal, reversing the judgment of the Divisional Court, decided that a transaction which is one of pure pledge is not a bill of sale within the meaning of the Bills of Sale Acts, though it is accompanied by a document signed by the pledgor providing for repayment with interest and giving a power of sale. The Divisional Court decided otherwise, in deference to the supposed view of the Court of Appeal in *Ex parte Parsons* (55 L. J., Q. B. 137). Had the decision stood, it would have made confusion worse confounded in this branch of the law. *Ex parte Parsons*, as Bowen L.J. explained, did not decide that the Bills of Sale Acts apply to pledges, but decided that it is no answer to the application of the Acts to say that the transaction could not be brought within the form in the schedule to the Act of 1882.

Where a deceased partner's separate estate is being administered it is well settled that the separate creditors can receive no interest until the partnership creditors have been paid their principal, but there seems to have been no authority until the recent case of *Whittingstall* v. *Gover* (55 L. T. R. 213) as to the respective rights of separate and partnership creditors to interest where a surplus remains after paying the separate and partnership creditors their principal in full. In *Whittingstall* v. *Gover* Chitty J. has now decided that the right to interest should follow the established rule as to principal, and priority be given to the separate creditors.

Millar v. *Toulmin* (17 Q. B. D. 603) illustrates the very large powers conferred on the Court of Appeal under the new Rules. The defendant in that case appealed against an order of the Divisional Court directing a new trial on the ground that the verdict was against the weight of evidence. The Court of Appeal agreed with the Divisional Court in thinking that the verdict was against the weight of evidence, and having all the materials before it, instead of directing a new trial, entered judgment at once for the plaintiff under O. 58, r. 4. This rule (differing herein from the corresponding rule 5 of O. 58 of the Rules of 1875) empowers the Court of Appeal to draw inferences of fact. A Divisional Court may also, under O. 40, r. 10, on an application for a new trial draw 'all inferences of fact,' but they must be 'not inconsistent with the finding of the jury.' There is no such restriction on the powers of the Court of Appeal.

In *Lydney & Wigpool Iron Ore Co.* v. *Bird* (33 Ch. D. 85), which was an

action by a company to recover secret profits by a promoter, Lindley L.J. made some important observations on the inaccurate phrases often used to describe the position of a promoter. 'It is not correct,' said the learned Judge, 'to say that *B* (the defendant) was the agent of the company when it did not exist, nor is it much less objectionable to talk of his being in a fiduciary relation to the company before the company had any existence. Moreover, to say that *B* was a promoter of the company and therefore liable to account to it is calculated to mislead, for the word promoter is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. ..... In every case it is better to look at the facts and ascertain and describe them as they are.'

In *Lewis* v. *Ramsdale* (38 W. R. 8) a power of attorney was given to sell and convert into money the donor's property, and 'for all or any of the purposes of these presents ... to do, execute and perform any act, deed or thing whatsoever.' The Court, following *Attwood* v. *Munning* (7 B. & C. 278) and distinguishing *Perry* v. *Holl* (29 L. J., Ch. 677), held that a mortgage by the donee was unauthorised. Such general words apply only to what is necessary for doing the particular acts for which the power is given and do not extend the power.

The rule of construction that a conveyance of land bounded by a road or river passes the soil of the road or the bed of the river *ad medium filum* was well exemplified in the case of *Micklethwait* v. *Newlay Bridge Company* (33 Ch. D. 133). That case shows how strong is the presumption of intention. It is not rebutted by the circumstance that the land is described as bounded by the road or river or as containing a specific admeasurement which does not include a moiety of the road or river-bed, or again by its being described by reference to a map or plan the measurement or colouring of which excludes the road or river-bed, nor is it rebutted by the circumstance that the grantor is at the date of the grant the owner of land on both sides of the river or road, nor by all these things taken together. To rebut the presumption, there must be evinced in the language of the grant, or there must be deducible by reasonable inference from the surrounding circumstances existing at the time of the grant, an intention that a moiety of the soil of the road or bed of the river should not pass.

In re Garnett, Robinson v. *Gandy* (35 L. J., Ch. 773) a young lady executed a release in respect of a share of residuary estate estimated at £10,000 and settled that amount shortly afterwards on her marriage, the settlement containing a covenant for settlement of after-acquired property. The share was afterwards ascertained to amount to £15,000, and the release set aside by the Court of Appeal on the ground of want of independent advice, *Gandy* v. *Macaulay* (31 Ch. D. 1). The question then arose whether the £5000 so set free was after-acquired property so as to come within the covenant. Kay J. held that it was, as having come into existence or at any rate into possession at the date of the order setting aside the release. The Court of Appeal reversed this decision. 'The setting aside of a release,' said Lindley L.J., 'does not confer a new title. If any title is acquired it can only be a pre-existing title, which by the removal of the bar caused by the release becomes capable of being asserted.'

In re Stone (33 Ch. D. 541) raised a question under *Bovill's Act*. *A* lent money to *B*, a trader, on the terms of receiving a moiety of the profits. A new contract was afterwards substituted by which *A* was to receive interest on the loan in lieu of profits, but there was no payment off and re-lending. *B* became insolvent: Held, on the authority of *Ex parte Mills, In re Tew* (L. R. 8 Ch. 569), that the time of the advance must be looked at, that the case came within the letter and the mischief of the Act, and that *A* must be postponed to the other creditors.

A landlord who has a right to prove for his rent in the winding-up of a company is not allowed to distrain. This is the result of the authorities on sect. 163 of the Companies Act, 1862. But what when his right of proof arises on a collateral security? In such a case, Fry J., in *Ex parte Clémence, Re Carriage Co-operative Supply Association* (23 Ch. D. 154), decided that the landlord ought not to be deprived of his right of distress. In *In re The New Constitutional Club Company* (55 L. J., Ch. 704) Kay J. reluctantly followed this decision. The construction put upon sect. 163 (leaving a stranger to the company at liberty to distrain) is, it may be observed, an equitable construction engrafted on the strict letter of the statute, and as such not to be extended beyond what is necessary for preventing injustice.

It is a well-settled rule that a solicitor, like any other agent, may not avail himself of information acquired during his employment to obtain a good bargain from his client. This salutary rule has now been held by Kay J. in *Luddy's Trustee* v. *Peard* (33 Ch. D. 500) to cover the case of a solicitor buying from his client's trustee in bankruptcy. The client in such a case, though his estate is temporarily divested by bankruptcy, has a contingent reversionary interest in any surplus that may remain, and this possibility is sufficient to sustain the fiduciary relation of the solicitor.

The common exception of 'perils of the seas' in a bill of lading has been under the consideration of the Court of Appeal in three recent cases. The judgment of Lopes L. J. in *Pandorf* v. *Hamilton* (16 Q. B. D. 629) as to damage by rats has been reversed (17 Q. B. D. 670). 'Rats do not come from the sea,' and the circumstance that by their gnawing of a pipe water comes in from the sea does not bring the resulting damage within 'dangers and accidents of the seas.' The judgment of Bowen and Fry L.JJ. shows that the decision is in harmony with American and general maritime law. In *The Xantho* (11 P. D. 170) the Court of Appeal decided that a collision *simpliciter* is not necessarily or even *prima facie* a 'peril of the seas,' by far the greater number of collisions being caused by negligence. Where there is negligence either on the part of the carrying vessel or the colliding vessel, *a fortiori* where both are to blame and winds and waves do not contribute, such a collision is not a 'peril of the seas;' *Woodley* v. *Mitchell* (11 Q. B. D. 47). In *Sailing Ship 'Garston' Company* v. *Hickie, Borman & Co.* (35 W. R. 33), the exception in the charter-party was 'all dangers and accidents of the seas, rivers and navigation.' The addition of the last word must, the Court held, be deemed to have been designed still further to limit the shipowner's liability; he was accordingly protected from liability for loss by collision caused solely by the negligence of another vessel, but (*semble*)

such a clause would not protect the shipowner from the consequences of his own negligence.

In *Scott* v. *Attorney-General* (55 L. J., P. D. & A. 57) a husband and wife domiciled in Cape Colony were divorced at the suit of the husband by a decree of the Colonial Court. By the Roman Dutch law which obtains at the Cape the guilty party in such a case is incompetent to marry again until the injured party marries, but the decree of divorce operates as a complete dissolution of the marriage. *A*, the divorced wife, came to England with the intention of settling there, and married again. The divorced husband had not married. On a petition by *A* for a declaration of the legitimacy of the children of her second marriage: Held that the disability as to remarriage ceased on *A*'s leaving the colonial jurisdiction, and that she was free on acquiring an English domicil to contract a valid marriage there.

Fine Art Society v. *Union Bank of London*, 17 Q. B. D. 705, illustrates the settled principle that persons dealing with goods or documents at the request of the apparent owner do so at their peril, special exceptions excepted, as regards any paramount claim of a third person: and this, however innocent and even prudent their conduct may have been. It also negatives the supposed principle that as between two innocent parties the one who made a fraud possible ought to bear the loss; for in this case it was clearly the plaintiffs who made the fraudulent dealing with the post-office orders possible, though they were held to have acted in an usual and reasonable manner.

It is fair to presume that the Building Societies Act, 1884 (47 and 48 Vic. c. 41) was not passed without regard to the maxim, *Interest reipublicae ut sit finis litium*. The House of Lords had before been called upon to adjudicate upon the latitude to be given to the word 'disputes' in the Building Societies Acts, and in March, 1884, it gave judgment in the case of *The Municipal Permanent Investment Building Society* v. *Kent* (9 App. Cas. 260), where the Lord Chancellor (Lord Selborne) took one view of the Building Societies Act, 1874, and Lords Blackburn and Watson took another, affirming in the result the decisions of the Court of Appeal and the Divisional Court. On the 7th August, 1884, the amending Act received the Royal assent. And now the first result of that amendment is given to the world, in the shape of *The Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Martin* (17 Q. B. D. 66, 609). In that case the Court of Appeal has unanimously reversed the judgment of Grove and Stephen JJ., as well as the orders of A. L. Smith J., and a Master. So that the new Act can hardly be said to have freed the subject from doubt. Indeed Lord Herschell says that no construction of it is free from difficulty, and no construction carries out a clear, defined, well-indicated policy on the part of the Legislature. It was evidently inspired by a passage in the judgment of Lord Selborne in Kent's case. Construed with the previous Acts, the Act accepts, as a broad result, this: when 'disputes' arise between a Society and its members, recourse to arbitration is alone to be had. But the word 'disputes' is strictly limited. First, it is limited to disputes which arise out of the social contract. Secondly, the word is not to apply to any dispute as to the construction or effect of any mortgage deed or contract contained in any document other than the rules of the Society. Thirdly, the use of

the word is not to 'prevent any Society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the Society would otherwise be by law entitled.' Now the sum total of what the Court of Appeal has decided in the most recent case on the subject, is that the question whether or not a Society had given credit to a member for payments which he alleged he had made in respect of principal moneys secured by the mortgage deed was not such a dispute as to limit the Society to arbitration. The Society was entitled to proceed with an action.

The system of incorporation and reference which is in these days adopted in the Statute Book produces some curious results. It is odd to find the Court of Appeal called upon to sit in judgment on a repealed section. Yet this is what happened in the case of *The Gaslight and Coke Company* v. *Hardy* (17 Q. B. D. 619). The simple question was whether a gas-stove let for hire was a 'fitting for the gas,' within the meaning of section 14 of the Gasworks Clauses Act, 1847 (10 and 11 Vic. c. 15). Now the Gasworks Clauses Act, 1847, is incorporated with and forms part of the Metropolis Gas Act, 1860 (23 and 24 Vic. c. 125), and it is also incorporated in the private Act of the plaintiff Company (31 and 32 Vic. c. cvi). Several of its sections, including section 14, are in the holocaust of the Statute Law Revision Act, 1875 (38 and 39 Vic. c. 66). These sections are 'repealed, except so far as incorporated with Special Acts to which 34 and 35 Vic. c. 41 does not apply.' This exception covered section 14 of the Gasworks Clauses Act, 1847, because section 14 is incorporated with the plaintiff Company's special Act of 1868, to which the Gasworks Clauses Act, 1871 (34 and 35 Vic. c. 41) does not apply (see section 3 of the latter Act). The result was that section 14 survived this elaborate process, and the Court of Appeal was free to decide, in opposition to Mr. Justice Mathew, that the gas-stove was a 'fitting for the gas.' In Lord Esher's eyes the expression must include all the apparatus which is used for the supply and the consumption of the gas, and therefore includes such a thing as a gas-stove, which is used for nothing else but the supply and consumption of the gas. Certainly a moral of the case is that one must not too hastily assume an Act or a clause repealed because it is specified in the schedule to a Statute Law Revision Act. In a recent case before Chitty J. of *Northam Bridge Co.* v. *Reg.* (not yet reported) an Act repealed, among many others, by the old General Turnpike Act, was found to have been so far revived by an obscurely framed exception in a later Act as to exempt the Postmaster-General from payment of toll for the use of a bridge made under special statutory authority, and preclude what might have been an interesting argument on the question of general exemption by prerogative.

A meeting will be held on an early day in next term to consider the advisability of establishing a society to encourage the study and advance the knowledge of the History of English Law. Lord Justice Fry has kindly consented to preside. It is suggested that the name of the Society shall be the Selden Society, and that its objects shall include (besides meetings for the reading and discussion of papers) the printing of unpublished MSS., and the publication of new editions and translations of works having an important bearing on English legal History, the collection of materials for a dictionary of Anglo-French and of law terms, and finally the collection of materials for a History of English Law. Approval of the

Society has been expressed by the Earl of Derby; the Bishop of Chester; Lord Herschell; the Home Secretary; Lords Justices Lindley and Fry; Sir Frederick Pollock; the Attorney General; Professors T. E. Holland, A. V. Dicey, and F. Pollock (Oxford); W. W. Skeat (Cambridge); Rev. W. Cunningham and Mr. F. W. Maitland (Cambridge); Messrs. John Evans, F.R.S., President, and H. S. Milman, Director of the Society of Antiquaries; Messrs. Bucknill, Q.C., Cookson, Q.C., Moulton, Q.C., Westlake, Q.C., White, Q.C., H. W. Elphinstone, G. H. Blakesley, R. Campbell, C. A. Fyffe, G. L. Gomme, F.S.A., H. Hall, F.S.A., Stuart Moore, F.S.A., O. C. Pell, J. H. Round, F. E. Sawyer, F.S.A., T. E. Scrutton, and others. Any person interested may communicate with Mr. P. EDWARD DOVE, 23 Old Buildings, Lincoln's Inn, who will be glad to receive any suggestions as to the objects and scope of the Society, and the names of all persons who wish to attend the Meeting.

A learned correspondent writes:—'Is the word *use*, which plays so large a part in our books of law, really the word *use*; that is to say, does it come from the Latin *usus*? I fancy that it comes from the Latin *opus*; that it is the word which in our old French books appears as *oeps*, *oes*, and *os*. Thus in the Leges Willelmi (I. 2. § 3) the Latin *ad opus vicecomitis*, *ad opus regium*, translates, or is translated by, the French *al os le vescunte*, *al os le rei*; and we must render these phrases by *to the use of the sheriff*, *to the use of the king*. Mr. Justice Holmes pointed out in your REVIEW (vol. i. p. 164) that at an early time we find feoffments made to *A ad opus B*. I have lately seen several cases from the first half of the thirteenth century, in which a donor, having enfeoffed an infant, commits the land to a third person *ad opus* the infant. I have seen one case in which *A emit terram ad opus B* with the intention of enfeoffing *B*'s son *in maritagio*. Here we have what looks much like the *use* of later days, and it occurs to me that really there has been no change of terminology, but rather a gradual misunderstanding of an old phrase. I am however quite ready to hear that philology will not away with this suggestion; if so, it falls to the ground: but I may point to what seems, from a mere lawyer's point of view, a parallel case. We read in books about copyholds that suit to a court-leet is not suit service, but suit real; in this it differs from suit to a court-baron. Most modern readers will suppose that suit real is somehow or another suit due in respect of a thing (*res*); but if they will be at pains to look at the Year Books, they will soon see that *real* does not come from *res*, but from *rei*, which comes from *regem*. Suit real is suit royal; the court-leet with its criminal jurisdiction is the king's court, and albeit the leet be in private hands, suit to it is suit due to the king's court, and is due, not merely from tenants, but from all residents. In 12 Henry VII. f. 16 (Pasch. pl. 1) we read *le sute sera real comme le Court est real*; it can surely be no distinctive mark of a court that it is *real*, but that it is *royal* is a noteworthy fact in the days of seignorial jurisdictions. Another good example of a verbal misunderstanding is as to the reason why military service due in respect of tenure is called foreign or forinsec service. Hale in a note to Coke upon Littleton (f. 69 b) says, "Though in some cases the subject was chargeable for the defence of the realm, yet clearly for foreign invasion none were chargeable but by tenure, and therefore service of chivalry was called forinsecum servicium." One has only to look at Bracton (f. 36) to see that this is a mistake. The services done by the tenant to his lord are intrinsic services, that is to say, they are the creatures of the bargain between these two persons, they are, so

to speak, inside the bargain; but military service is done, not to the lord, but to the king; it is a burden on the land, which no bargain between mesne lords and their tenants can remove; it is outside, it is foreign to, their contracts. A mistake about this leads us to slur over a most noticeable point in English feudalism, namely that with us military service is always forinsec, only to be done to the king in the national army, never to the lord in his private quarrel. But I must say no more of popular legal etymologies lest I add to the number of mistakes.'

As regards the parentage of the word *use*, we believe that our correspondent hes but hit upon what is now an accepted doctrine among philologists. It seems that at a very early period the French *oes, ues*, from the Latin *opus*, was confused in English with the French *us* from the Latin *usus*, and the *use* of our law is traceable directly to the former rather than to the latter. We have to thank Dr. Murray for some very interesting notes on this point, and will refer our readers to what Professor Skeat says of *use* in the second edition of his dictionary.

On the 12th November last, the American Minister opened the session of the Edinburgh Philosophical Institution with a solid and eloquent address on 'The Law of the Land.' Taking as his text the phrase of Magna Charta, *per legem terrae*, Mr. Phelps defined the law of the land as the law 'that runs with the land and descends with the land'—'the higher law under which legislation itself obtains its authority and courts their jurisdiction'—'the law which does not change'—'the law which Parliament itself is bound not to infringe.' This law reposes on the theory 'that mankind possesses certain natural rights, antecedent to government.' If government fails to respect these rights, 'the obligation of allegiance terminates, and the right of revolution begins.' Mr. Phelps took occasion to notice the attacks made on personal liberty and private property in the supposed interest of the poor. He pointed to the economic history of his own country as a proof that 'it is not the few but the many who are most largely benefited by the protection of property;' and he warned his hearers of the dangers of class legislation.

So far as the politics of this vigorous address are concerned, there is nothing to be said against it; but a disciple of Austin may be permitted to ask whether the political theory gains anything by being stated in terms of law. 'Natural rights' are recognised by the Constitution of the United States; but the question is, whether any number of Constitutions can give legal existence to such rights, except in so far as they are embodied in the municipal law—'the law which changes.' If, at the time of the Dred Scott decision, the Supreme Court had undertaken to free all the slaves in America, its action would have been unconstitutional, but it would have been in strict accordance with the theory of natural rights.

Mr. Phelps gave a careful definition of the right to liberty, as he understands it, and the definition is important, because it shows how difficult it is to give legal precision to a merely political conception. Liberty, he says, includes the right to go, come, and stay [to leave the kingdom in spite of a *ne exeat*?], to enjoy the family relations [to marry a deceased wife's sister?], to pursue honest industries [speculation in stocks?], and innocent recreations [deer-stalking in Strath Farrar?], to exercise freedom of opinion and speech [to persuade people not to pay their debts?], and private property in all its forms and conditions [including the right to exact a competition rent where local usage recognises tenant-right?]. The questions within brackets indicate a few of the problems raised by the extremely

general terms of the definition. These problems cannot be solved by reference to an authority superior to government; they are solved by the action of the government itself. But if government solves them wrongly, it may be said that we need not obey; the right of revolution has begun. Is this so? If Parliament, without reason, forbids me to 'enjoy the family relations' by marrying my wife's sister, may I take the law into my own hands? Of course, if Parliament passes oppressive laws, I shall very probably rebel; but I do not claim any right to rebel. The right of revolution, when one tries to define it, means simply the moral duty, under certain circumstances, of beginning a physical struggle, in which both legal and moral right may very possibly get the worst of it.

The crusade against property, which Mr. Phelps desires to repel, is inspired by this very theory of natural rights. If Mr. Henry George is accused of infringing the natural rights of property, he may well reply:—'Not at all; I simply assert that the highest of all natural rights—the right to live—implies a right to the use of so much land as is necessary for subsistence.' If Mr. Phelps is content to stand by the law of the land, as Austin would define it, he has a safe answer to Mr. George; but if he prefers to stand by natural rights, he may find himself 'hoist with his own petard.'

We have from Natal the following report of a constitutional controversy in the Transvaal:—

There took place last September at Pretoria a long deferred criminal trial, the prisoner being one A. H. Nellmapius charged with theft in connection with his management as a Director of the 'Powder Factory Co.'—a state-subsidised enterprise. Nellmapius was a holder of various Government monopolies or 'concessions' and exercised a good deal of influence.

The trial took place before Mr. Justice Brand, one of the two puisne judges, and a jury who, after a protracted hearing, brought in a verdict of guilty, and a sentence of eighteen months' imprisonment was passed. Notice of revision (appeal) to the High Court was lodged and allowed. The prisoner also petitioned the President and Executive who met and decided they could not consider the petition because a judicial 'revision' was pending. Thereupon the prisoner's advisers withdrew the notice of revision and again petitioned, and the Executive again meeting decided to exercise the prerogative, and Nellmapius was granted a free pardon and set at liberty. Mr. Justice Brand at once sent in his resignation which was promptly accepted!

The Chief Judge (Koetze) was absent on circuit at Heidelberg, but hearing of all this wild work he adjourned his Court and hurried to the capital, where public and press were loudly indignant. The Bar and side Bar and also the public received him with addresses deprecating interference from any quarter with the independent administration of justice. Mr. Koetze issued a warrant for Nellmapius' re-arrest, holding it would seem that Nellmapius could not of his mere motion withdraw the notice of revision, and also that the action of the Executive Council was illegal.

Art. 83 of the Transvaal 'Grondwet' (written constitution) is:—'The President with the Executive Council has (?) the prerogative of commuting or remitting sentences pronounced for misconduct or crime on the recommendation of the Court which pronounced the sentence, or on the petition of the offender after having obtained the opinion of the Court thereon.' If the Executive acted without a recommendation by Mr. Brand or without seeking his opinion on the prisoner's petition, their action seems to have been unconstitutional.

THE HARVARD LAW SCHOOL.

We reprint from the *Boston* (Mass.) *Weekly Advertiser* the speeches delivered by Mr. Justice Holmes and Prof. Langdell at the 'quarter-millennial' celebration of Harvard University on the 5th of November.

Judge Holmes' Oration.

It is not wonderful that the graduates of the Law School of Harvard College should wish to keep alive their connection with it. About three quarters of a century ago it began with a chief justice of the supreme court of Massachusetts for its Royal professor. A little later, one of the most illustrious judges who ever sat on the United States supreme bench—Mr. Justice Story—accepted a professorship in it created for him by Nathan Dane. And from that time to this it has had the services of great and famous lawyers, it has been the source of a large part of the most important legal literature which the country has produced, it has furnished a world-renowned model in its modes of instruction, and it has had among its students future chief justices and justices, and leaders of state bars and of the national bar too numerous for me to thrill you with the mention of their names.

It has not taught great lawyers only. Many who have won fame in other fields began their studies here. Sumner and Phillips were among the bachelors of 1834. The orator whom we shall hear in a day or two appears in the list of 1840 alongside of William Story and the chief justice of this State, and one of the associate justices, who is himself not less known as a soldier and as an orator than he is as a judge. Perhaps without revealing family secrets I may whisper that next Monday's poet also tasted our masculine diet before seeking more easily digested, if not more nutritious, food elsewhere. Enough. Of course we are proud of the Harvard Law School. Of course we love every limb of Harvard College. Of course we rejoice to manifest our brotherhood by the symbol of this association.

I will say no more of the reasons for our coming together. But by your leave I will say a few words about the use and meaning of law schools, especially of our law school, and about its methods of instruction, as they appear to one who has had some occasion to consider them.

A law school does not undertake to teach success. That combination of tact and will which gives a man immediate prominence among his fellows comes from nature, not from instruction; and if it can be helped at all by advice, such advice is not offered here. It might be expected that I should say by way of natural antithesis that what a law school does undertake to teach is law. But I am not ready to say even that without a qualification. It seems to me that nearly all the education which men can get from others is moral, not intellectual. The main part of intellectual education is not the acquisition of facts, but learning how to make facts live. Culture, in the sense of fruitless knowledge, I, for one, abhor. The mark of a master is that facts, which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order and live and bear fruit. But you cannot make a master by teaching. He makes himself by aid of his natural gifts.

Education, other than self-education, lies mainly in the shaping of men's interests and aims. If you convince a man that another way of looking at

things is more profound, another form of pleasure more subtle than that to which he has been accustomed—if you make him really see it—the very nature of man is such that he will desire the profounder thought and the subtler joy. So I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.

Our country needs such teaching very much. I think we should all agree that the passion for equality has passed far beyond the political or even the social sphere. We are not only unwilling to admit that any class or society is better than that in which we move, but our customary attitude towards every one in authority of any kind is that he is only the lucky recipient of honour or salary above the average which any average man might as well receive as he. When the effervescence of democratic negation extends its workings beyond the abolition of external distinctions of rank to spiritual things, when the passion for equality is not content with founding social intercourse upon universal human sympathy and a community of interests in which all may share, but attacks the lines of nature which establish orders and degrees among the souls of men, they are not only wrong but ignobly wrong. Modesty and reverence are no less virtues of freemen than the democratic feeling which will submit neither to arrogance nor servility.

To inculcate those virtues, to correct the ignoble excess of a noble feeling to which I have referred, I know of no teacher so powerful and persuasive as the little army of specialists. They carry no banners. They beat no drums. But where they are, men learn that bustle and push are not the equals of quiet genius and serene mastery. They compel others, who need their help or who are enlightened by their teaching, to obedience and respect. They set the example themselves. For they furnish in the intellectual world a perfect type of the union of democracy with discipline. They bow to no one who seeks to impose his authority by foreign aid. They hold that science, like courage, is never beyond the necessity of proof, but must always be ready to prove itself against all challengers. But to one who has shown himself a master they pay the proud reverence of men who know what valiant combat means, and who reserve the right to combat against their leader even, if he should seem to waver in the service of truth, their only queen.

In the army of which I speak the lawyers are not the least important corps. For all lawyers are specialists. Not in the narrow sense in which we sometimes use the word in the profession, of persons who confine themselves to a particular branch of practice, such as conveyancing or patents, but specialists who have taken all law to be their province; specialists because they have undertaken to master a special branch of human knowledge—a branch, I may add, which is more immediately connected with all the highest interests of man than any other which deals with practical affairs.

Lawyers, too, were among the first specialists to be needed and to appear in America. And I believe it would be hard to exaggerate the goodness of their influence in favour of sane and orderly thinking. But lawyers feel the spirit of the times like other people. They, like others, are for ever trying to discover cheap and agreeable substitutes for real things. I fear that the bar has done its full share to exalt that most hateful of American words and ideals—smartness—as against dignity of moral feeling and profundity of knowledge. It is from within the bar, not from outside, that I have heard the new gospel that learning is out of date and that the man

for the times is no longer the thinker and the scholar, but the smart man unencumbered with other artillery than the latest edition of the digest and the latest revision of the statutes.

The aim of a law school should be, the aim of the Harvard Law School has been, not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the abode of the masters. A law school should be at once the workshop and the nursery of specialists in the sense which I have explained. It should obtain for teachers men in each generation who are producing the best work of that generation. Teaching should not stop, but rather should foster, production. The 'enthusiasm of the lecture-room,' the contagious interest of companionship, should make the students partners in their teacher's work. The ferment of genius in its creative moment is quickly imparted. If a man is great he makes others believe in greatness. He makes them incapable of mean ideals and easy self-satisfaction. His pupils will accept no substitute for realities, but at the same time they learn that the only coin with which realities can be bought is life.

Our school has been such a workshop and such a nursery as I describe. What men it has turned out I have hinted already and do not need to say. What works it has produced is known to all the world. From ardent co-operation of student and teacher have sprung Greenleaf on Evidence, and Stearns on Real Actions, and Story's epoch-making Commentaries, and Parsons on Contracts, and Washburn on Real Property; and, marking a later epoch, Langdell on Contracts and on Equity Pleading, and Ames on Bills and Notes, and Gray on Perpetuities, and I hope we may soon add Thayer on Evidence. You will notice that these books are very different in character from one another, but you will notice also how many of them have this in common, that they have marked and largely made an epoch.

There are plenty of men nowadays of not a hundredth part of Story's power who could write as good statements of the law as his, or better. And when some mediocre fluent book has been printed, how often have we heard it proclaimed:—Lo, here is a greater than Story! But if you consider the state of legal literature when Story began to write, and from what wells of learning the discursive streams of his speech were fed, I think you will be inclined to agree with me that he has done more than any other English-speaking man in this century to make the law luminous and easy to understand.

But Story's simple philosophizing has ceased to satisfy men's minds. I think it might be said with safety that no man of his or of the succeeding generation could have stated the law in a form that deserved to abide, because neither his nor the succeeding generation possessed or could have possessed the historical knowledge—had made or could have made the analyses of principles which are necessary before the cardinal doctrines of the law can be known and understood in their precise contours and in their innermost meanings.

The new work is now being done. Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope. At the same time, under the influence of our revived interest in philosophical speculation, a thousand heads are analyzing and generalizing the rules of law and the grounds on which they stand. The law has got to be stated over again, and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago. And now I venture to add my hope and my belief that when the day comes which

I predict, the professors of the Harvard Law School will be found to have had a hand in the change, not less important than that which Story has had in determining the form of the text-books of the last half-century.

Corresponding to the change which I say is taking place there has been another change in the mode of teaching. How far the correspondence is conscious I do not stop to inquire. For whatever reason the professors of this school have said to themselves more definitely than ever before: We will not be contented to send forth students with nothing but a ragbag full of general principles—a throng of glittering generalities like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures. They have said that to make a general principle worth anything, you must give it a body. You must show in which way and how far it would be applied actually in an actual system. You must show how it has gradually emerged as the felt reconciliation of concrete instances, no one of which established it in terms. Finally, you must show its historic relations to other principles often of very different dates and origins, and thus set it in the perspective without which its proportions will never be truly judged.

In pursuance of these views there have been substituted for text-books more and more, so far as practicable, those books of cases which were received at first by many with a somewhat contemptuous smile and pitying contrast of the good old days, but which now, after fifteen years, bid fair to revolutionize the teaching both of this country and of England.

I pause for a moment to say what I hope it is scarcely necessary for me to say—that in thus giving in my adhesion to the present methods of instruction I am not wanting in grateful and appreciative recollection—alas! it can be only recollection now—of the earlier teachers under whom I studied. In my day the dean of this school was Professor Parker, the ex-chief justice of New Hampshire, who I think was one of the greatest of American judges, and who showed in the chair the same qualities that made him famous on the bench. His associates were Parsons, almost if not quite a man of genius, and gifted with a power of impressive statement which I do not know that I have ever seen equalled, and Washburn, who taught us all to realize the meaning of the phrase which I have already quoted from Vangerow—the enthusiasm of the lecture-room. He did more for me than the learning of Coke and the logic of Fearne could have done without his kindly ardour.

To return, and to say a word more about the theory on which these books of cases are used, it has long seemed to me a striking circumstance that the ablest of the agitators for codification, Sir James Stephen, and the originator of the present mode of teaching, Mr. Langdell, start from the same premises to reach seemingly opposite conclusions. The number of legal principles is small, says, in effect, Sir James Stephen, therefore codify them. The number of legal principles is small, says Mr. Langdell, therefore they may be taught through the cases which have developed and established them. Well, I think there is much force in Sir James Stephen's argument, if you can find competent men and get them to undertake the task, and at any rate I am not now going to express an opinion that he is wrong. But I am certain from my own experience that Mr. Langdell is right. I am certain that when your object is not to make a bouquet of the law for the public, nor to prune and graft it by legislation, but to plant its roots where they will grow, in minds devoted henceforth to that one end, there is no way to be compared to Mr. Langdell's way. Why, look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle? And is not a

principle more exactly and intimately grasped as the unexpressed major premise of the half-dozen examples which mark its extent and its limits than it can be in any abstract form of words? Expressed or unexpressed, is it not better known when you have studied its embryology and the lines of its growth than when you merely see it lying dead before you on the printed page?

I have referred to my own experience. During the short time that I had the honour of teaching in the school, it fell to me, among other things, to instruct the first-year men in torts. With some misgivings I plunged a class of beginners straight into Mr. Ames' collection of cases, and we began to discuss them together in Mr. Langdell's method. The result was better than I even hoped it would be. After a week or two, when the first confusing novelty was over, I found that my class examined the questions proposed with an accuracy of view which they never could have learned from text-books, and which often exceeded that to be found in the text-books. I, at least, if no one else, gained a good deal from our daily encounters.

My experience as a judge has confirmed the belief I formed as a professor. Of course a young man cannot try or argue a case as well as one who has had years of experience. Most of you also would probably agree with me that no teaching which a man receives from others at all approaches in importance what he does for himself, and that one who has simply been a docile pupil has got but a very little way. But I do think that in the thoroughness of their training, and the systematic character of their knowledge, the young men of the present day start better equipped when they begin their practical experience than it was possible for their predecessors to have been. And although no school can boast a monopoly of promising young men, Cambridge, of course, has its full proportion of them at our bar, and I do think that the methods of teaching here bear fruits in their work.

I sometimes hear a wish expressed by the impatient that the teaching here should be more practical. I remember that a very wise and able man said to a friend of mine when he was beginning his professional life, 'Don't know too much law;' and I think we all can imagine cases where the warning would be useful. But a far more useful thing is what was said to me as a student by one no less wise and able—afterwards my partner and always my friend—when I was talking as young men do about seeing practice and all the other things which seemed practical to my inexperience: 'The business of a lawyer is to know law.' The professors of this law school mean to make their students know law. They think the most practical teaching is that which takes their students to the bottom of what they seek to know. They, therefore, mean to make them master the common law and equity as working systems, and think that when that is accomplished they will have no trouble with the improvements of the last half-century. I believe they are entirely right, not only in the end they aim at, but in the way they take to reach that end.

Yes, this school has been, is, and I hope long will be a centre where great lawyers perfect their achievements, and from which young men, even more inspired by their example than instructed by their teaching, go forth in their turn, not to imitate what their masters have done, but to live their own lives more freely for the ferment imparted to them here. The men trained in this school may not always be the most knowing in the ways of getting on. The noblest of them must often feel that they are committed to lives of proud dependence; the dependence of men who command no

factitious aids to success, but rely upon unadvertised knowledge and silent devotion; dependence upon finding an appreciation which they cannot seek, but dependence proud in the conviction that the knowledge to which their lives are consecrated is of things which it concerns the world to know. It is the dependence of abstract thought, of science, of beauty, of poetry and art, of every flower of civilization, upon finding a soil generous enough to support it. If it does not, it must die. But the world needs the flower more than the flower needs life.

I said that a law school ought to teach law in the grand manner—that it had something more to do than simply to teach law. I think we may claim for our school that it has not been wanting in greatness. I once heard a Russian say that in the middle class of Russia there were many specialists, in the upper class there were civilized men. Perhaps in America, for reasons which I have mentioned, we need specialists even more than we do civilized men. Civilized men who are nothing else are a little apt to think that they cannot breathe the American atmosphere. But if a man is a specialist it is most desirable that he should also be civilized; that he should have laid in the outline of the other sciences as well as the light and shade of his own; that he should be reasonable and see things in their proportion. Nay more, that he should be passionate as well as reasonable—that he should be able not only to explain but to feel. That the ardours of intellectual pursuit should be relieved by the charms of art, should be succeeded by the joy of life, become an end in itself.

At Harvard College is realized in some degree the palpitating manifoldness of a truly civilized life. Its aspirations are concealed because they are chastened and instructed, but I believe in my soul that they are not the less noble that they are silent. The golden light of the university is not confined to the undergraduate department. It is shed over all the schools. He who has once seen it becomes other than he was for evermore. I have said that the best part of our education is moral. It is the crowning glory of this law school that it has kindled in many a heart an inextinguishable fire.

Professor Langdell.

Gentlemen of the Harvard Law School Association: I am very grateful for this unexpected greeting. You will be surprised to learn that this is the second time that your president has called upon me to speak for the Harvard Law School. The first time was nearly seventeen years ago, when I was about to assume the duties of Dane professor. And I do not know that I can do better than begin now where I left off then. On that occasion I called attention to the anomalous condition of legal education in English-speaking countries, the anomaly consisting in the fact that in those countries a knowledge of law had been acquired, as a rule, only or in connection with its practice and administration, while in all the rest of Christendom law has always been taught and studied in universities. And I ventured to express the opinion that the true interests of legal education in this country required that, in this respect, we should not follow longer in the footsteps of England, but should bring ourselves into harmony with the rest of the civilized world.

Since that time I have not concerned myself with legal education outside of Harvard Law School; but I have tried to do my part towards making the teaching and the study of law in that school worthy of a university; toward making the honourable institution of which we are celebrating the

250th anniversary a true university, and the law school not the least of its departments; in short, toward placing the law school, so far as differences of circumstances would permit, in the position occupied by the law faculties in the universities of continental Europe. And what I say of myself in this respect I may, with at least equal truth, say of all my associates.

To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books. If law be not a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can only be learned and taught in a university by means of printed books. If, therefore, there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means; for instance, the work of a lawyer's office, or the proceedings of courts of justice, it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge,—if every student who would obtain any mastery of law as a science must resort to these ultimate sources, and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him,—then a university, and a university alone, can afford every possible facility for teaching and learning law. I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate, or of the Roman prætor, still less of the Roman procurator, but the experience of the Roman jurisconsult.

My associates and myself, therefore, have constantly acted upon the view that law is a science, and that a well-equipped university is the true place for teaching and learning that science. Accordingly, the law library has been the object of our greatest and most constant solicitude. We have not done for it all that we should have been glad to do, but we have done much. Indeed, in the library of to-day one would find it difficult to recognise the library of seventeen years ago. We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.

From what I have already said, it easily follows that a good academic training, especially in the study of languages, is a necessary qualification for the successful study of law; that the study of law should be regular, systematic and earnest, not intermittent, desultory or perfunctory; and that the study should be prosecuted for a length of time bearing some reasonable proportion to the magnitude of the subject. Accordingly, to secure the first of these objects, we have established an examination for admission for such as are not graduates. To secure the third we have made three years of study necessary for a degree. To secure the second we have done several

things. We have established a course of studies which we require to be pursued in the prescribed order. We have established annual examinations, to be held at the end of each year, in the work of that year. We require every candidate for a degree to pass his examinations in the studies of the first year at the end of his first year, as a condition of being admitted into the second year, and in the studies of the second year as a condition of being admitted into the third year; and we do not permit any one to pass his examinations in the studies of any year unless he has been regularly admitted into that year at the beginning of the year. In other words, we do not permit any one to pass examinations in any studies except those of the year to which he belongs. We have increased the amount of instruction in the last seventeen years, from ten hours a week to thirty hours a week. This enables us to give the whole of the three years' course every year, thus giving to each class its appropriate instruction.

The result of all these measures is that the school is strictly divided into three classes, each class doing the work which belongs to its year, and every man having the strongest possible inducement to do his work as it should be done and when it should be done.

Let it not be supposed that we are unmindful of the work of our predecessors. We should indeed be ungrateful if we were. We do not forget that they began with nothing, while we have enjoyed the fruits of all their labours. We do not wish to disguise the fact that we could not have done our work had we not had the work of our predecessors to build upon as a foundation.

Nor are we unmindful of the constant support and encouragement which we have received from the president of the university. He has never hesitated, wavered, or faltered when any responsibility was to be assumed or a work to be done.

Lastly, we are not unmindful of the support we have received from the students of the school, both while they were in the school and since they have left it. Without their support and co-operation the various measures to which I have referred (many of which could not have been expected to be popular measures) could never have been maintained.

It has been, in a great degree, the eagerness with which they have always encountered difficulties, the ability with which they have followed the subtlest lines of reasoning and detected the slightest flaws or sophistries in argument, and the persistence with which they have refused to be satisfied so long as any doubt remained to be cleared up, that has given to the instructors such success as they have achieved. Finally, it is almost wholly to their testimony, both while in the school and after leaving it, that the school is indebted for such public recognition as it has received.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
